

**“SOUND COLLISION:”  
FEDERAL LABOR LAW AND  
THE BANKRUPTCY CODE  
COLLIDE IN THIS YEAR’S  
AIRLINE BANKRUPTCIES**

**BY**

**ANTHONY MICHAEL SABINO\***

\*Professor of Law, The Peter J. Tobin College of Business, St. John’s University,  
New York. Sabino & Sabino, P.C., New York.

The author dedicates this Article to the memory of his late beloved wife and  
partner, Mary Jane Catherine Sabino, who left us much too soon, but  
nonetheless left behind a wonderous living legacy that shall endure beyond both  
of us, a legacy named Michael and James.

Turbulent Skies:  
The Airline Industry  
In Tumult

It has been long said that flying on a commercial jetliner is far safer than driving a car, and the statistics certainly bear out that old chestnut. Simply put, the marvels of modern technology, to say nothing of the incredible skills of the men and women who pilot these flying chariots, operate with outstanding effectiveness to avoid midair mishaps. And yet while such collision avoidance technology and procedures may work almost magically to avert disaster, such wonders are not available in the one place that the airline industry dearly needs them --- the federal bankruptcy court.

We of course speak of collisions of a different kind, the collision of divergent bodies of law, each set out on its own course, each with its own destination, and each not truly designed to avoid dangerous intersections and the natural consequences of such calamities. While such legal dangers always exist in business, they are heightened in the case of an airline industry member entering the turbulent world of bankruptcy proceedings. And while not fatal in the true sense of the word, nonetheless the outcome of such impacts can be so deep and injurious, that the very existence of the air carrier can be at stake.

This danger is not completely new to the airline industry. We flew in decidedly “unfriendly skies” over a decade ago, when a spate of airline Chapter 11 brought about a dangerous clash between the airline industry and the Bankruptcy Code.<sup>1</sup> Most survived that collision, but consider also the icons of the airways, now defunct because they could not successfully navigate the reorganization route: Pan Am, TWA, and Eastern, among others.

But these days, one merely has to flick on the TV, surf the Internet or scan the newspapers to readily see that the airline industry is in disarray, much of it due to its major players either currently in or recently emerged from Chapter 11. The former indicates Delta and Northwest, the latter United and U.S. Airways (even the decade-old bankruptcy of the now-flourishing Continental still stings). This past year has seen something new, and even more dangerous, for these more recent clashes in the context of airline Chapter 11s have resounded beyond the tarmac, into the heart of American industry itself.

For the first time, and fittingly in cases of truly first impression, the courts of bankruptcy have been compelled to address the most serious issues of federal labor law colliding head-on with the Bankruptcy Code. This is not mere collateral damage; the repercussions will shake the foundations of law and business to their respective cores. Little wonder there had been a nationwide preoccupation with these matters.<sup>2</sup>

Therefore the author's contribution to this Annual Survey is to exposit and analyze the relevant decisions that have so altered the legal landscape of the past year. Fortunately, there is justice, not carnage here, but we have much to learn from the forces in counterpoise, and the aftermath of when they collide.<sup>3</sup>

#### The Last Stand: Pensions and United

For our first case, we start with an involvement in the relatively prosaic matter of bankrupt airlines and pension liabilities. To be sure, this is still an emotionally charged issue, particularly for those presently dependent upon or anticipating a pension payout

based upon years of diligent labor. Nevertheless, in contrast to other “hot button” issues in this arena, it is seemingly mild by comparison.

The impact of bankruptcy upon pension plans is always a hotly contested issue, especially when the plan is to be terminated. Such a vociferous dispute is found in In re UAL Corporation (Pilots’ Pension Plan Termination),<sup>4</sup> The eminent Circuit Judge Estabrook sets the stage thusly: earlier in 2006 the Seventh Circuit held that United Airlines and its uninsured pilots had reached a valid bargain, whereby the pilots acquiesced to the termination of the airline’s defined-benefit pension plan at the end of June, 2005, in exchange for \$550 million in convertible notes in the reorganized entity, plus a new defined-contribution pension plan.<sup>5</sup>

This accord contemplated United maintaining, but not contributing to, the then-existing pension plan. Pilots would continue to receive benefits from the plan, even after its termination, and any shortfall in the plan trust would be made up by the Pension Benefit Guaranty Corporation (the “PBGC”), a semi-autonomous government agency. As it turned out, the subsidy the PBGC was supposed to provide was valued at a “hefty” \$84 million.<sup>6</sup>

The agency balked at that sum, and commenced an adversary proceeding in the bankruptcy court, proposing to terminate the plan retroactively by at the end of 2004, a year and one-half earlier than stipulated to. In addition, the debtor stated its intention to case certain supplemental pension benefits ahead of schedule.<sup>7</sup> After much back and forth in the lower courts, the PBGC prevailed, and the appellate court had this consolidated appeal of the agency, the debtor, the pilots’ union, and a group of retired pilots.<sup>8</sup>

Because the decision below implicated the workings of a government agency, Circuit Judge Estabrook posited the first issue as a question of deference. “Deference is appropriate when agencies wield delegated interpretive or adjudicatory power,” as evidenced by agency rulemaking and administrative adjudication, respectively. *Id.* at 449. Here, the PBGC made a unilateral and self-executing decision when it decreed the defined-benefit plan “should be wrapped up at the end of 2004,” said the panel. In no event did the agency exercise either its rulemaking or adjudicative powers.<sup>9</sup>

In contrast, the PBGC’s sole remedy was a statutory avenue to seek court relief.<sup>10</sup> “That implies an independent judicial role,” noted Judge Estabrook.<sup>11</sup> A court exercising that role here would find no PBGC rules on the subject at hand, nor interpretative guidelines, which in any event would be respected, but not controlling.<sup>12</sup> “All the PBGC had done is commence litigation,” and the tribunal need not defer to the agency while it stood in the role of an ordinary plaintiff.<sup>13</sup> That point disposed of, the panel moved closer to the heart of the case.

Judge Estabrook relates the tale of the dealmaking and horse trading between United and the PBGC. By terminating its plan, the debtor became liable to the agency for any shortfall.<sup>14</sup> And what a shortfall—in the UAL bankruptcy an astounding \$1.5 billion, which the beleaguered airline obviously did not have. Thus, the PBGC agreed to take that same amount in stock in the “new” United that would emerge from Chapter 11. However, the agency did explicitly reserve its right to seek an earlier termination of the pilots’ defined-benefit plan.<sup>15</sup>

The pilots’ union now objected to the agency’s exercise of that right, claiming that by accepting cash in reorganized debtor, the PBGC had forfeited the right to seek an

earlier termination. “But how so,” retorted the tribunal? The settlement expressly gave the pension regulators the right to seek such relief, and the debtor had done nothing to ameliorate the agency’s loss.<sup>16</sup>

Now the circuit asked if this \$84 million shortfall was such an unreasonable increase in liability so as to justify agency action? That question, said Judge Estabrook, was one of fact, and thus entitled to deference on appeal.<sup>17</sup> In reply, the pilots compared the sum to many things (even the cost of an aircraft carrier!), but the tribunal was unpersuaded. Perspective is key, said the Seventh Circuit, further admonishing that “[a]ny number can be made to look trifling by comparing it with some much larger number,” but that is too facile and plainly unhelpful.<sup>18</sup> \$84 million “is substantial by any normal calculation,” the panel held, and here was but a mere “bargaining chip,” utilized by the debtor to enlist the pilots’ support, at the expense of the U.S. Treasury. “No wonder [the PBGC] objected,” and the panel upheld the lower court’s ruling that the new increment was unreasonable, and thus validated the agency’s decision to opt for the year-end 2004 termination date.<sup>19</sup>

This left the final issue for resolution: when did the debtor’s obligation to pay supplemental benefits end?<sup>20</sup> Judge Estabrook asked if the settlement between the airline and the pilots compelled the former to keep paying until the courts fixed a plan termination date.<sup>21</sup> The pilots contended that the supplements should have been paid until February 1, 2006, when United’s plan of reorganization took effect.<sup>22</sup>

The Seventh Circuit found the union’s position problematic at best. By requesting the lower court to terminate the pension plan earlier, the PBGC took the matter out of United’s hands. Indeed, that the court below granted the agency the early

termination it petitioned for was conclusive, found the panel. “That pulled the rug out” from the deal struck between United and its pilots, now trumped by the agency’s actions in court.<sup>23</sup> Therefore, the supplemental benefits were deemed ended December 30, 2004, the early termination date granted by PBGC by the district judge.<sup>24</sup>

The tribunal found adjacent support for this holding in the statutory language as well. Federal pension law permits a court, upon a proper request by the PBGC, to override private agreements.<sup>25</sup> Once the PBGC intervened, “United and its unions lacked authority to set a [plan] termination date.”<sup>26</sup> Side agreements such as the one here crumble before the court’s statutory authority to set a plan termination date. And finally, Judge Estabrook criticized such private accords as transferring corporate obligations to the public fisc, an intolerable result.<sup>27</sup>

In a follow on opinion issued the same day, the same Seventh Circuit panel relegated the claims of United’s retired pilots to unsecured creditor status, having no better rights to the monies the supplemental payments represented.<sup>28</sup> Now with eminent Circuit Judge Richard Posner writing, the panel harshly, but nonetheless correctly, set things to rights with this declaration. “In any event, as we said, the claim is fantastic. It is true that arbitrary differences in the treatment of creditors in bankruptcy are improper. So when creditors are placed in separate classes in the sense of receiving different percentages of their claims, the differences in treatment must be justified.”<sup>29</sup>

In conclusion, the Seventh Circuit’s principal holdings were to declare the pilots’ pension plan terminated as of December 30, 2004, as the lower courts had ordered, and to remand with instructions for the entry of a judgment authorizing the debtor to reclaim the supplemental benefits improperly paid out subsequent to that termination date.<sup>30</sup>

Just as the stirring of a gentle breeze can portend the coming of a great storm, UAL was but a mild buffeting for what was to follow. Dangerous turbulence lay ahead, as the nation's insolvency law was vectored for a head-on collision with other federal law. To the beginnings of that controversy, we now turn.

Eye of the Storm:  
Section 1113 of  
The Bankruptcy Code

To truly understand the past year's clash between the Bankruptcy Code and federal labor law, we first need to analyze that statutory proviso of the former that is at the epicenter of the controversy. And while this statute has a rich and varied history, it was only recently placed in stark counterpoise to other federal enactments that regulate labor relations in the troubled airline industry. That law is widely known as Section 1113, and even among those well versed in the law, superstitions about its last two digits have left many wondering if it was preordained to controversy.

Section 1113 of the Bankruptcy Code permits a debtor to reject a collective bargaining agreement<sup>31</sup> if (i) rejection is "necessary" to its ability to reorganize; (ii) the debtor has made a proposal to the authorized representative of the employees that has been rejected by the authorized representative without "good cause"; and (iii) the balance of the equities clearly favors rejection. Section 1113 attempts to reconcile the public policy that favors collective bargaining with the reality of bankruptcy, recognizing that Chapter 11 is not merely business as usual but an extremely serious process that can lead to liquidation and the loss of the jobs of all the debtor's employees as well as the creditors' opportunity for any meaningful recovery.<sup>32</sup>

Section 1113 of the Bankruptcy Code is a comprehensive provision designed by Congress to reconcile the reorganization imperatives of a Chapter 11 debtor with the collective bargaining interests of organized employees.<sup>33</sup> It was enacted in 1984 in response to N.L.R.B. v. Bildisco & Bildisco,<sup>34</sup> in which the Supreme Court held that a debtor could reject a collective bargaining agreement as an executory contract under Bankruptcy Code Section 365(a) by showing that the agreement “burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.” Congress, overruling Bildisco in part, provided that collective bargaining agreements would not be subject to the general provisions of Section 365, and it laid down certain procedural and substantive prerequisites to a debtor’s rejection of a collective bargaining agreement. These prerequisites, set forth in Section 1113, are aimed at facilitating consensual modifications to collective bargaining agreements but include finite time periods in recognition of the fact that indefinite delay can doom a Chapter 11 reorganization.

As part of this expedited negotiation process, Section 1113(b) requires a debtor to provide its union with proposed modifications to a collective bargaining agreement prior to filing an application to reject the agreement. The proposed modifications must (i) be based on the most complete and reliable information available, (ii) be necessary to permit the debtor’s reorganization, and (iii) assure that all affected parties are treated fairly and equitably.<sup>35</sup> Additionally, the debtor must provide the union with the relevant information underlying the proposed modifications and bargain in good faith.<sup>36</sup> In turn, Section 1113(c) provides that rejection is appropriate if (i) the debtor satisfies the requirements of Section 1113(b)(1), (ii) the union refuses to agree to the debtor’s

proposed modifications without good cause, and (iii) the balance of the equities clearly weighs in favor of rejection.<sup>37</sup> The debtor bears the burden of persuasion in making the three substantive showings under Section 1113(c).<sup>38</sup>

The most fundamental requirement for rejection of a collective bargaining agreement is that the rejection must be “necessary.” Under Section 1113(b)(1)(A), a debtor seeking to reject a collective bargaining agreement must show not only that the agreement is “burdensome” but that the rejection is “necessary” to permit the reorganization of the debtor.

In Truck Drivers Local 807 v. Carey Transportation Inc.,<sup>39</sup> the Second Circuit held that “the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization successfully.” In developing this standard, the Second Circuit specifically rejected the Third Circuit’s narrow construction of Section 1113 in Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America,<sup>40</sup> where the latter tribunal construed the term “necessary” to encompass only those modifications essential to the debtor’s short-term survival or necessary to prevent liquidation.<sup>41</sup>

Carey explained that the term “necessary” could not be synonymous with “essential” or “bare minimum” because if a debtor were constrained to propose only the most minimal changes to a collective bargaining agreement, it would have no room to engage in the good faith negotiations required by the statute.<sup>42</sup> Rather, a debtor’s proposed modifications are considered necessary if they have a significant impact on the

debtor's operations and are required for the debtor to successfully reorganize and compete in the marketplace upon emergence from Chapter 11.<sup>43</sup>

The Second Circuit has also held that a debtor need only make a showing as to the overall necessity of the proposal, rather than prove that each element of the proposal is necessary to reorganization.<sup>44</sup> As the Court reasoned in Royal Composing Room, requiring that each element of a proposal be necessary would allow a union to defeat a rejection application by singling out an element as unnecessary where it could be reasonably substituted with an alternative.<sup>45</sup> Thus, in determining whether the debtor's proposed modifications are necessary, "a court must focus on the total impact of the changes in the debtor's ability to reorganize, not on whether any single proposed change will achieve that result."<sup>46</sup>

Although necessary modifications to a collective bargaining agreement are limited to "employees benefits and protections," they are not limited to wages alone.<sup>47</sup> A proposal may be deemed necessary for purposes of Section 1113(b) even if it includes non-economic modifications.<sup>48</sup> Courts have frequently held that non-economic modifications that have a significant economic impact on the debtor's financial operations can be necessary to the debtor's reorganization.<sup>49</sup>

Section 1113 is also based on the premise that, notwithstanding a Chapter 11 filing, there should be minimum interference with labor/management collective bargaining, and that the parties should be required to make every reasonable effort to reach a negotiated solution. A debtor must make its initial Section 1113 proposal to labor "based on the most complete and reliable information available at the time of such

proposal, “and it must meet with the union’s representatives at reasonable times and confer in good faith in attempting to reach a mutually satisfactory solution.”<sup>50</sup>

Congress imposed the further requirement in Section 1113(b)(1) that all parties must be treated fairly and equitably in connection with the rejection of a collective bargaining agreement, recognizing that labor should not have to bear a disproportionate share of the burden of saving a debtor. The purpose of the fair and equitable requirement is to “spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree.”<sup>51</sup>

However, it is not necessary for all affected parties to receive identical modifications, and concessions asked of various labor groups may reflect differences in the groups’ wages and benefit levels.<sup>52</sup> It is also appropriate for a court to consider a group’s prepetition cost reductions in determining whether that group would “shoulder a proportional” share of the debtor’s proposed cost reductions.<sup>53</sup>

Because it is often difficult to compare the differing sacrifices of parties in interest, courts apply a flexible approach in determining what constitutes “fair and equitable treatment.”<sup>54</sup> Thus, a debtor can meet the fair and equitable requirement of Section 1113 by showing that its proposal treats the union fairly when compared with the burden imposed on other parties by the debtor’s additional cost-cutting measures and the Chapter 11 process generally.<sup>55</sup>

After the requirements of Section 1113(b) are met, Section 1113(c)(2) conditions the rejection of a collective bargaining agreement on a union’s refusal to accept a debtor’s proposal “without good cause.” Although “good cause” is not defined in the Bankruptcy Code, it is closely related to the requirements of Section 1113(b)(1)

described above, as well as the requirement under Section 1113(b)(2) that the parties negotiate in good faith.

In terms of Section 1113, the burden on the parties to negotiate is best analyzed under Section 1113(c)(2), which permits rejection of the agreement only if the union has rejected the debtor's proposal without good cause. If the union seeks to negotiate compromises that meet its needs while preserving the debtor's required savings, it would be unlikely that its rejection of the proposal could be found to be lacking good cause. If, on the other hand, the union refuses to compromise, it is as unlikely it could be found to have acted with good cause.<sup>56</sup>

The "good cause" and good faith requirements have been held to preclude a debtor from simply offering a "take it or leave it" proposal.<sup>57</sup> A union may also argue that any part of a proposal was "included by the employer in bad faith, in an attempt to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise."<sup>58</sup> However, depending on the facts of the case, a debtor may not be obligated to reduce the total amount of cost savings requested in its original proposal to demonstrate good faith.<sup>59</sup>

Once a debtor establishes that the proposal is necessary, fair and in good faith, the union must produce sufficient evidence to justify its refusal to accept the debtor's proposal.<sup>60</sup> If a union demands provisions that are not economically feasible and offers no alternatives that would permit the debtor to reorganize, the court will find that the union acted without good cause.<sup>61</sup>

The final requirement, under Section 1113(c)(3), is that the balance of the equities must clearly favor rejection of the agreement. Congress adopted this

requirement as a codification of that portion of Bildisco that established an equitable standard for rejection of a collective bargaining agreement.<sup>62</sup> The Second Circuit has directed courts to look at the following factors to determine whether the balance of the equities clearly favors rejection:

- 1) the likelihood and consequences of liquidation if rejection is not permitted;
- 2) the likely reduction in the value of creditors' claims if the bargaining agreement remains in force;
- 3) the likelihood and consequences of a strike if the bargaining agreement is voided;
- 4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved;
- 5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and
- 6) the good or bad faith of the parties in dealing with the debtor's financial dilemma.<sup>63</sup>

Each of these factors should be viewed in context of a debtor's attempts to reorganize. As the Supreme Court stated in Bildisco, bankruptcy courts "must focus on the ultimate goal of Chapter 11 .... The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization."<sup>64</sup> It has also been stated that while a court must focus on the long-term health of the debtor when balancing the equities, it must also

consider the employees affected by the debtor's proposed modifications and the policies of collective bargaining under labor law.<sup>65</sup>

As aforesaid, and now as so clearly explicated in the preceding pages, Section 1113 is highly nuanced, and much case law has been devoted to exploring and refining its contours. Yet with all that, it took the recent travails of the tumultuous airline bankruptcies to bring the statute into sharp relief. Below we will turn to our first instance of its new and sometimes agonizing growth.

#### Delta: Section 1113 In Action

A recent example of Section 1113 at work is found in In re Delta Airlines,<sup>66</sup> and concerns subsidiary Comair, Inc.'s second attempt to reject its CBA and impose cost-savings measures upon its unionized workforce. Comair, a commuter/feeder airline subsidiary of the larger Delta, had already been rebuffed once, and told by the bankruptcy judge to return to the bargaining table with its union.<sup>67</sup>

In brief, during the months of May and June, 2006, the airline and its flight attendants' union did precisely that, trading proposals and counterproposals across the table, with Comair targeting a cost reduction of \$8.9 million, while the union endeavored to yield those savings only by changes to work rules and benefits, but not via a reduction of wages.

Despite obvious bona fide efforts, the two sides eventually stalemated when the union rejected the debtor's final proposal in mid-June.<sup>68</sup> When the parties deadlocked, Comair's proposal would have saved it approximately \$8 million in labor costs, while the union's final proposal was valued at a little over \$6 million in savings for the debtor.<sup>69</sup>

Bankruptcy Judge Adlai Hardin succinctly set out the principal issues dividing the parties.<sup>70</sup> While these diverse points included wages, 401(k) plan contributions, and the possible reopening of the CBA at a future date,<sup>71</sup> the major bone of contention remained the airline's demand for a change in work rules that represented over \$1.5 million in savings, according to Comair.<sup>72</sup>

The court then set about the task of applying the statute to the instant situation. First up was the matter of the necessity of these proposed changes to the debtor's reorganization. Judge Hardin did not hesitate to find Comair's flight attendants enjoyed the highest wages, the least productive work rules, and the best retirement benefits when compared to a dozen of its peers in the regional airline sector.

The evidence "dramatically illustrated" the competitive disadvantage burdening this debtor.<sup>73</sup> Equally so, Comair's inability to compete for feeder business from the major carriers, even its own parent Delta, was also painfully apparent.<sup>74</sup> "There can be no doubt," said Judge Hardin, that the reduction of such labor costs was absolutely necessary for the debtor to successfully reorganize.<sup>75</sup>

Next, the court asked if the parties had conferred in good faith? Examining the debtor's various modifications in position to bring it closer to the union's demands, the court found those negotiations "certainly sufficient" to meet the statutory edict.<sup>76</sup> To be sure, Comair's refusal to accede to certain of the flight attendants' demands did not in the least diminish its already established good faith, since its decision not to capitulate was based upon sound economic and business reasons.<sup>77</sup>

Did the debtor's proposal treat all sides fairly and equitably? Yes, it did, ruled Judge Hardin.<sup>78</sup> As proof of that, the airline had moved substantially away from its

opening demands for cost savings, and “worked creatively with the [u]nion” to achieve its cost-cutting goals via work rule changes “affecting the least number of flight attendants... [with] the least effect” upon their membership.<sup>79</sup>

Indeed, even Comair’s modified proposal would leave that group of employees at a pay scale and with work rules “materially higher and more benefit” than their peers at competing regional carriers.<sup>80</sup> Thus, having proposed changes that would minimize and in fact spread the pain at the airline, the court found the fair and equitable parameter easily met.<sup>81</sup>

The fourth part of Section 1113’s multiprong test calls for an inquiry as to whether or not the union lacked good cause to reject the debtor’s proposed modification.<sup>82</sup> As before, Judge Hardin found in favor of the airline and against its workers. The court noted that the debtor’s proposed modifications to the existing CBA were both necessary to permit a reorganization and fair and equitable when compared to the airline’s terms with all of its other labor constituencies.<sup>83</sup>

Second, the union lacked good reason to reject what the debtor proposed. In particular, the flight attendants’ intransigence on refusing to change certain work rules foreclosed a finding that they acted in good faith. Quite to the contrary, the union’s inflexibility on a modification that would in truth impact “only 77 out of approximately 970 flight attendants” could not be justified, said Judge Hardin.<sup>84</sup>

Finally, did the balancing of the equities here justify the statutory rejection of this labor accord?<sup>85</sup> “[B]eyond doubt,” declared Judge Hardin, a “material reduction in Comair’s flight attendant costs is essential” for this debtor to emerge from bankruptcy. An “extraordinary competitive regional airline market” made these changes imperative,

held the court.<sup>86</sup> Ironically, noted Judge Hardin, if the union had accepted the carrier's earlier proposal, its pay scale and work rules would still have ranked Comair's flight attendants well above their peers in the airline labor market.<sup>87</sup>

Thus finding Section 1113 met in each and every one of its aspects, the court authorized the rejection of the existing CBA, and the imposition of the new wage levels and work rules sought by the debtor airline.<sup>88</sup> And thus ends one of the last year's landmarks of Section 1113 in action.

But when all is considered, Delta was merely prologue to an eventful year, as the Bankruptcy Code and the federal laws of labor were to collide again and again in the many airline reorganizations of months past. Ironically, it is Northwest Air Lines, which filed for Chapter 11 the same day as Delta, which provided the greatest drama in this arena.

#### Unrest At Northwest

The recent and ongoing Chapter 11 of Northwest Air Lines garnered much public attention over the past year, including an outlet in the Minnesota federal court case captioned Association of Flight Attendants-CWA v. Mesaba Aviation, Inc.<sup>89</sup> For you see Mesaba was and still is a regional airline that links numerous outlying airports in the American Midwest with NWA's three hubs in the Twin Cities (Minneapolis /St. Paul), Detroit, and Memphis, respectively.<sup>90</sup> And like so many carriers in the 21<sup>st</sup> Century, it succumbed to bankruptcy, and then sought to use the provisions of Chapter 11 to free itself from burdensome labor contracts.<sup>91</sup>

The Mesaba opinion opens in an extraordinary fashion. District Judge Davis powerfully declares that this case shall greatly affect many lives, specifically airline

industry professionals with years of service to their calling, some of whom will become unemployed or underpaid. Why? Because this debtor seeks court approval to restructure its union contracts. And this “joyless task to participate in the undoing of hard-fought labor agreements” falls to this federal court.<sup>92</sup>

District Judge Davis’ candor matched his strength when he further declared that “[b]ankruptcy law is draconian to labor unions.”<sup>93</sup> The Mesaba court reeled off the names of troubled airlines that have recently sought refuge in Chapter 11: Aloha, ATA, Comair, Delta, Esa, Hawaiian, Independence, NWA, United and U.S. Airways. “The results are disastrous for labor.”

Judge Davis notes the many instances of double-digit wage cuts, all court authorized, as carriers fight to survive, and unions battle to keep jobs, let alone wages.<sup>94</sup> An ugly picture, to be sure, but nonetheless one accurately portrayed by this court. Against this dismal backdrop, the Mesaba court turned to the case at bar.<sup>95</sup>

Filling in the remaining factual details, the court noted that NWA owned over one quarter of the debtor’s common stock, and had veto power over the choice of the regional carrier’s CEO. For the last decade, Mesaba has been a feeder airline exclusively for NWA. The two carriers were inextricably linked, not only by this common ownership, but other contractual commitments, principally an arrangement that dictated the size of the regional carrier’s fleet, the financing of which relied, upon at least in part, capital provided by the larger carrier.<sup>96</sup>

Post-9/11, Mesaba suffered along with the rest of the industry. When NWA filed for bankruptcy in September, 2005, the loss of its key financial backer forced Mesaba into Chapter 11 less than a month later.<sup>97</sup>

The debtor faced a grim reality: to emerge from Chapter 11, it would have to cut its fleet by about half, and shave off over \$17 million in labor costs. Thus, it had no choice but to exercise the final option of Section 1113, and pursue the restructuring or even outright rejection of its labor accords.<sup>98</sup>

In early December, 2005, the debtor made overtures to its three key unions --- the pilots, the flight attendants, and the mechanics --- to replace the existing CBAs.<sup>99</sup> An agreement could not be reached. Mesaba then moved for an outright rejection of its labor contracts, but was at first rebuffed by the bankruptcy judge for not bargaining in good faith.<sup>100</sup>

The debtor addressed these concerns, updated the information it provided to the unions, and after they still could not agree, renewed the contract rejection motion.<sup>101</sup> This time, however, the bankruptcy court agreed with the airline, found it had met the statutory prerequisites, and ordered the existing labor accords rejected. This appeal followed.<sup>102</sup>

Judge Davis now began his task of appellate review of that lower court decision, under the twin rubrics of searching factual finding for clear error and conclusions of law de novo.<sup>103</sup>

The Mesaba court articulated a nine-point test whereby a debtor may reject its labor contracts.<sup>104</sup> District Judge Davis said the bankruptcy court shall allow rejection only if a Chapter 11 debtor meets nine requirements:

- 1) The debtor in possession must make a proposal to the union to modify the collective bargaining agreement.

- 2) The proposal must be based on the most complete and reliable information available at the time of the proposal.
- 3) The proposed modifications must be necessary to permit the reorganization of the debtor.
- 4) The proposed modifications must assure that all creditors, the debtor, and all of the affected parties are treated fairly and equitably.
- 5) The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.
- 6) Between the time of the making of the proposal and the time of the hearing an approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union.
- 7) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
- 8) The union must have refused to accept the proposal without good cause.
- 9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.<sup>105</sup>

Not only are these elements numerous, said the Mesaba court, the debtor must persuade on all of them by a preponderance of the evidence.<sup>106</sup>

Judge Davis now asked the first key question: had the airline proved the need for its rejection of the labor accords?<sup>107</sup> On that point, Mesaba acknowledged that its home Eighth Circuit had not addressed the issue.

However, the Second Circuit had earlier held that necessity is proven when the debtor demonstrates that its proposal is made in good faith, and is comprised of

necessary, but not absolutely minimal, changes needed to successfully exit Chapter 11.<sup>108</sup> It is a given that necessity is weighted with a view towards the debtor's future as a financially sound entity.<sup>109</sup> In contradistinction, the Third Circuit had previously defined "necessity" more narrowly, finding it contemplated only the modifications immediately needed to restore the debtor to financial stability, per force eschewing the long term picture.<sup>110</sup>

The Mesaba court squarely aligned itself with "the more flexible standard" of the Second Circuit, ostensibly also the majority view.<sup>111</sup> District Judge Davis found greater wisdom in a yardstick that looked beyond the here and now and to the future, implicitly an approval more consistent with the overriding goal of Section 1113 to contribute to successful, not just short-term, reorganizations.<sup>112</sup>

Turning now to measure the debtor's alleged need to reject its CBA against this standard,<sup>113</sup> the Mesaba court first parsed the airline's factual arguments for necessity. District Judge Davis agreed that the investors whose capital was needed to pull the debtor out of bankruptcy would place emphasis on the airline's operating margin. Operating margins are an important part of the mix of information that investors use when deciding to risk their capital. Therefore, presenting a viable operating margin was a necessity for this debtor.<sup>114</sup>

As to the size of that margin, the unions countered that Mesaba's desire for an 8% operating margin was not justified. The court disagreed. Based upon much expert testimony, Judge Davis found ample support that the size of the margin the carrier sought was a necessity for it to emerge from Chapter 11, attract financing and new capital, and to be competitive with its peers.<sup>115</sup>

And to achieve that operating margin, the labor cost cuts the airline petitioned for were a necessity.<sup>116</sup> Indeed, because the smaller airline's very survival depended upon its business with the larger NWA, achieving that cost saving target was even more of an imperative.<sup>117</sup>

Acknowledging the complexity of Section 1113, District Judge Davis now analyzed if the debtor had met these prerequisites. To be sure, the process was characterized by the bankruptcy judge as, among other things, messy, frustrating, frantic, and arduous.

Nevertheless, that notice of the reality of the contentiousness of such proceedings did not diminish the creation by the court below of a detailed factual record, said the Mesaba court. Thus, Judge Davis found no clear error.<sup>118</sup>

More to the point, did the airline provide the most complete and reliable data available to the union for its deliberations? Yes, it did, declared Mesaba.<sup>119</sup>

Judge Davis opined that information given by management to labor in the Section 1113 process need not be perfect; it simply needs to be as honest and current as possible. Moreover, in the instant case, the debtor's updating of the information provided decidedly tipped the balance in its favor.<sup>120</sup>

Given that Section 1113 demands the two sides meet in good faith, the district court addressed this requirement next.<sup>121</sup> Again, while acknowledging the airline's compliance with the statute was not exactly perfect, District Judge Davis pragmatically noted that the debtor met with the mechanics' union at least 16 times, with the flight attendants' representatives nearly two dozen times, and with the pilots "at least 40 times."<sup>122</sup> It was unlikely that additional meeting would have yielded a different result,

said the court. Thus, the debtor fulfilled the statutory mandate to meet and confer in good faith.<sup>123</sup>

Nevertheless, the Mesaba court's discussion of the good faith requirement was marred by one additional matter---“snap-back” provisions. In labor accords, such a contractual stipulation, as the name suggests, requires that wages reduced today will “snap-back” to higher, historical levels, at such times that the employer returns to profitability. Where snap-backs fit into the matrix of Section 1113 is, however, confused at best.

It has been held that a debtor is not always required to include a snap-back provision in its Section 1113 proposals.<sup>124</sup> However, “[s]nap-back provisions in modification proposals are favored because they ensure that once a company is profitable enough for successful reorganization, further profits not ‘necessary’ for reorganization are returned to the employees, who made the concessions.”<sup>125</sup>

The Mesaba court did not decide if the airline was required to include snap-backs in its proposals; it is possible the absence of snap-backs might be justified. However, the court noted that inclusion of snap-backs would be a large step towards reaching mutual agreement and cultivating trust with the unions. The court was certain that Mesaba's upper management will not give up the possibility of increasing their compensation in the event that Mesaba's recovery is more profitable than expected.<sup>126</sup> Thus, the matter was left more or less unresolved by the district court.

The “fair and equitable treatment” of all parties was the next parameter to be judged by the court in deciding if the debtor should be allowed to modify its labor accords.<sup>127</sup> This proviso is driven by the policy of an equal sharing of the burden of

reorganization among all concerned.<sup>128</sup> This analysis per force requires an examination of the impact upon management and creditors, for it is true that a debtor cannot demand concessions of its unionized work force without simultaneous sacrifices by its management, shareholders, and creditors.<sup>129</sup>

In that regard, District Judge Davis found the debtor had acted fairly and equitably in extracting concessions from every corner of labor, management, vendors and creditors, but with one notable exception. The airline had not adduced evidence of the impact, if any, upon its parent holding company, a entity in fact 27.5% owned by NWA.<sup>130</sup> Mesaba bears the burden of proof, by a preponderance of the evidence, Judge Davis reminds, of demonstrating that its parent company was accorded similar treatment.<sup>131</sup>

Certainly, the court found merit in the debtor's response that it was difficult to measure the impact of its proposals upon its corporate parent. And Judge Davis stipulated that a debtor need not address how every conceivable party is affected by a Section 1113 proposal.

Notwithstanding, the Mesaba court held that the debtor "had the obligation to at least address the effects of reorganization on all relevant constituencies," including its parent company.<sup>132</sup> Because the NWA-dominated parent of this debtor was "a major player in this bankruptcy," District Judge Davis ordered a remand to the bankruptcy court on this discrete point.<sup>133</sup>

Next, the unions argued that they had good cause to reject the debtors' demands to modify their CBAs, a point upon which if they prevailed, the airline would be denied Section 1113 relief. Here the district court held for the debtor. The airline had

substantively demonstrated its dire need for wage concessions to avoid liquidation, and coupled with its adherence to the statute's procedural edicts, Judge Davis declared that the unions lacked good cause to refuse the debtor's demands.<sup>134</sup>

Finally, the Mesaba court was called upon to balance the equities, to ascertain if such a balancing favored rejection of the CBAs. Judge Davis ruled that they did. If the relief requested by the debtor was not granted, dire consequences would follow, including, but not limited to, the liquidation of the airline and the attendant loss of everyone's job and the loss of value to creditors. Indeed, this strong likelihood of liquidation far outweighed the threat of a strike if the debtor obtained what it wanted.<sup>135</sup>

So in conclusion, upon the salient points that the debtor did not adequately explain the fair and equitable treatment of its corporate parent if its labor accords were rejected, and the role of contractual "snap-backs" in assessing the fair and equitable requirement for negotiations, District Judge Davis remanded to the bankruptcy court for further proceedings on those limited issues, but nonetheless affirmed as correct all the other multitudinous points allowing the airline to reject its CBAs pursuant to Section 1113.<sup>136</sup>

In total, Mesaba answered a great many questions as to the proper conduct of Section 1113 negotiations in the context of an airline Chapter 11. It stands as an important milestone in that developing jurisprudence.

#### Mesaba's Epilogue

This aforesaid remand to the bankruptcy court bears some brief mention. At the end of the day, in what we shall call Mesaba II,<sup>137</sup> Chief Bankruptcy Judge Gregory F. Kishel essentially vacated his prior Section 1113 order, and placed the onus upon the

debtor as to the next step, be it withdrawal of its motion, settlement or a fresh decision on new evidence.<sup>138</sup>

In particular, the bankruptcy court noted its power to reopen the proceedings, and take in further evidence, in light of the higher court's instructions on the remand.<sup>139</sup> Chief Bankruptcy Judge Kishel made the candid observation that the instant case labored under a "highly-tensioned dynamic" of otherwise "mainstream labor negotiations... played out concurrently against a pitched adversarial process of litigation."<sup>140</sup> Given these dark clouds overshadowing any future deliberations, the court thought it best to leave it to the airline as to how it wished to press its case before the bench.<sup>141</sup>

Yet Mesaba II made other cogent observations germane to our analysis. Zeroing in on the role of the "snap-back" demands in the negotiations, one of only two issues upon which the district court reversed and remanded, Chief Bankruptcy Judge Kishel rightly declared "there is precious little case-law development" as to the statutory fair and equitable requirements vis-à-vis snap-backs, "and essentially none" as to the good faith bargaining mandate of Section 1113 and that contractual device.<sup>142</sup>

Mesaba II reminds that the unions demanded snap-backs, the debtor flatly refused, citing, inter alia, its uncertain future, and the unions, in turn, decided that obstinacy was proof of a failure by the airline to bargain in good faith. The bankruptcy court now carefully pointed out that Mesaba did not rule that snap-backs had to be negotiated by the debtor to fulfill its statutory requirement of good faith; rather, the district judge remanded because of a lack of factual development over the issue.<sup>143</sup>

With an insightful foray into the art of negotiation, Chief Bankruptcy Judge Kishel made no definitive ruling, but did sketch out a roadmap for this case and others:

Perhaps they would be an element for the unions to surrender in exchange for some other sort of benefit, perhaps they were to be granted by the debtor in one variant as a harmless “hollow promise” with symbolic significance alone. Judge Davis expressly left it open to the debtor to better prove that inclusion of snap-backs in a concessionary package would truly jeopardize its future financial stability, in some appropriate context on remand. But he also expected the debtor to accept their presence as one chit at play in comprehensive bargaining, not to reject them out of hand, and to show that a refusal to include them by the end of bargaining under Section 1113 was substantially justified by their lack of utility in reorganization. Clearly, he left food for thought for the debtor and the unions alike on the issue, with the results to be put into application in both bargaining and any renewed presentation to this Court.<sup>144</sup>

Mesaba II now turned to the only other point raised by the remand, that being consideration of any Section 1113 rejection upon the debtor’s parent holding company.<sup>145</sup> The bankruptcy court interpreted its instructions from the district judge as a mandate to explore what, if anything, the debtor intended to do with the equity stake owned by its ultimate parent, the equally bankrupt NWA.<sup>146</sup>

The Mesaba II court acknowledged that NWA could indirectly benefit from its affiliate’s rejection of its union contracts, an outcome antithetical to Section 1113’s requirement to “share the pain” among all constituencies, debtor, employees, creditors, and owners alike.<sup>147</sup> Yet in a stinging rebuke, Chief Bankruptcy Judge Kishel criticized

the unions for being obtuse on the argument of the initial hearings, characterizing their approach as making a “hot but unilluminating original objection.”<sup>148</sup> No matter, indicated the court, for now that it had shared its perspective as to the direction further proceedings on this remand should take, Mesaba II again squarely put the ball in the debtor’s hand as to the next step to be taken.<sup>149</sup>

While Mesaba II can by no means be called determinative, it did illuminate the snap-back controversy, something that clearly required more case law development. Furthermore, by highlighting the need of the debtor subsidiary to “share the pain” with its equally insolvent parent, the resultant holding properly emphasized that the intricacies of interlocking bankruptcies between corporate affiliates need to be fully exposed to the light of day; for without such exposure, critical determinations as to their collective path out of Chapter 11 cannot be justly made. Yet even with all this past, it was but another steppingstone to the true watershed case of the last year, to which we now turn.

MidAir Collision:  
Northwest, Section 1113  
And Federal Labor Law

It has been the author’s custom, in the several years of contributing to this erudite Survey, to discuss last (but certainly not least!) the singular case with the most profound impact over the last year upon the selected topic. This year, that is easily accomplished, for what follows is not merely a case of first impression, it is the initial foray into a domain untouched in bankruptcy jurisprudence for over twenty-five years. Add to the mixture the high public profile and, finally, the vast implications for two distinct bodies of federal law, and we have a truly fitting capstone for our annual contribution.

This new landmark is Northwest Airlines Corp. v. Association of Flight Attendants (In re Northwest Airlines Corp.),<sup>150</sup> a decision of the Southern District of New York arising when its bankruptcy court denied the debtor's request for a preliminary injunction to prevent an employee strike, on the grounds of lack of jurisdiction.<sup>151</sup> "The central question" thereby became whether the bankruptcy judge erred in determining that he lacked the jurisdiction to enjoin a labor strike. "Specifically" declared District Judge Victor Marrero, the key issue was whether, following a rejection of a collective bargaining agreement in accord with the Bankruptcy Code, could an insolvent carrier seek to enjoin a union from striking in response to such rejection, or would such an injunction be barred by federal labor law. The court held that such an injunction may issue, and accordingly reversed and remanded to the bankruptcy court below.<sup>152</sup>

District Judge Marrero introduced his decision by providing valuable context. He noted the extensive public attention, the numerous amici curiae, and the press coverage<sup>153</sup> drawn by the expectation that this case would significantly impact both labor and bankruptcy law by setting a precedent where none had previously existed. This was so because the instant controversy fell precisely at the four corners where the same number of federal statutory schemes intersected; the Railway Labor Act (the "RLA"), the Norris-LaGuardia Act (the "NLGA"), the National Labor Relations Act (the "NLRA"), and the Bankruptcy Code (the "Code").

For decades, these laws have worked, sometimes separately and sometimes in harmonious co-existence, to regulate the management/labor relationship and keep America working. "From time to time, however, . . . some actual and potential conflicts" arise when these distinct bodies of law collide.<sup>154</sup> While legislative tension and conflicting

public policies are certainly not unknown, this four-way intersection, “presents unique challenges,” said Judge Marrero.<sup>155</sup>

Notwithstanding such clashes between statutes, the court’s obligation was clear; to read the involved laws as a whole, accommodate each as much as possible, to give each effect, and allow them “to co-exist insofar as they are not irreparably at odds.”<sup>156</sup> This precept, Judge Marrero opined, was all the more important because Congress, “in legislating in the same subject at different times and for different reasons,” evinced a careful judgment to promulgate an integrated structure of federal labor law. Much like our entire system of government, this individual field is comprised of distinct parts that function within their own domain.

Yet, notwithstanding each one’s distinctiveness, they occupy common ground and support each other, as well as the whole scheme. To ignore this mutuality would be error, said the court. Put another way, Judge Marrero found the divergent views of the parties, and to some extent the bankruptcy court below, were troublesome because they all offered two-dimensional solutions to three-dimensional problems.<sup>157</sup>

But there was yet another telling point that would shape this court’s analysis; the “exceptional recognition” federal lawmakers have given to the importance of the nation’s interstate transportation system, particularly railroads and airlines. These carriers play a vital role in America’s economy, national security, and overall welfare, and there is an “abiding public interest” in maintaining these systems free from labor strife.<sup>158</sup> This, in turn, requires a course of statutory interpretation that reconciles conflicting laws, while avoiding absurd anomalies.<sup>159</sup>

Now, in the first hints of the direction in which it was heading, the court went on to say it would be ironic indeed to conclude that a debtor's "lawful resort" to the Bankruptcy Code would put an end to statutory mandates aimed at fostering labor peace, and trigger a labor strike "that could spell doom by liquidation."<sup>160</sup> A more sensible interpretation would view these diverse laws as bringing about a process of peaceful negotiation to resolve labor unrest among common carriers, rather than grant a "premature license to engage in open industrial hostilities."

To be precise, said Judge Marrero, the relevant laws should be construed as a whole "to prescribe an coherent scheme for...railroad and airline industries" that would maintain operations, "keep the disputants at the negotiating table," and postpone an impasse. The preservation of collective bargaining procedures is clearly what Congress envisioned in this design, and the court was set upon accommodating that legislative goal. This course would eventually lead to granting the debtor the injunctive relief it sought, as an entitlement under the numerous laws at issue and the instant factual setting.<sup>161</sup> As for the latter, the opinion turned next to that discussion.

The facts begin with Northwest Airlines Corporation ("NWA") filing for Chapter 11 in September, 2005. The debtor soon pursued the rejection of its various labor contracts with six different unions. The Association of Flight Attendants and its predecessor (the "AFA") represented that segment of the airline's work force. Attempts at a consensual restructuring of the AFA contract failed, so in July, 2006, NWA obtained the formal abrogation of the accord, pursuant to Section 1113 of the Bankruptcy Code.<sup>162</sup> In granting the relief requested, the bankruptcy court found the rejection was necessary to

permit the debtor to reorganize, and all other statutory preconditions were met. The order granting the Section 1113 relief was never appealed.<sup>163</sup>

But rather than exercise its right to take immediate action and force new labor terms upon the flight attendants, NWA stayed at the bargaining table, and continued negotiating with the union to consensually modify the old collective bargaining agreement (the “CBA”). Notwithstanding these efforts, the union membership twice voted down a modified contract. Believing it now had no choice, NWA now exercised its Section 1113 rights, and imposed the new contract terms. The same day the union declared its intention to strike and otherwise engage in actions aimed at disrupting the airline’s operations.<sup>164</sup>

The debtor reacted swiftly. The next day, NWA moved for injunctive relief prohibiting any strike or job action by the union. While the bankruptcy court denied the motion, it did recognize the peril the airline would be put in if a strike were to occur. The airline’s Chapter 11 would be jeopardized, and NWA might be forced to liquidate. The public interest in a sound and reliable transportation system was also threatened by any labor strife.<sup>165</sup> An expedited appeal followed.<sup>166</sup>

As aforementioned, four distinct federal laws vectored in to create the instant controversy. The NWA court took each in turn. First, the RLA.<sup>167</sup>

Historically, the RLA was enacted in 1926, after decades of labor unrest in the rail industry had proven the ineffectiveness of earlier law.<sup>168</sup> Ten years later, it was amended to bring the nascent airline industry within its purview, forever linking labor relations within these two modes of transportation under the same statutory umbrella.<sup>169</sup>

The paramount purpose of the RLA, as expressed in the statute, is to avoid any interruption to commerce or to the operation of any carrier engaged therein.<sup>170</sup> In succinct terms, as acknowledged by the courts, the “primary goal” of the RLA is “to settle strikes and avoid interruption to commerce.”<sup>171</sup>

The key to achieving these lofty objective was codified at what the NWA court called Section 2 (First) of the RLA.<sup>172</sup> This proviso imposes a duty upon carriers and employees to exert all reasonable efforts to reach accords upon pay and work conditions, and settle all labor disputes so as “to avoid any interruption to commerce or to the operations of any carrier.”<sup>173</sup> The Supreme Court has characterized Section 2 (First) as the very soul of the RLA,<sup>174</sup> and the high Court has further pronounced its powerful legal mandate must be enforced by an appropriate means developed sui generis, including, if necessary, by injunction.<sup>175</sup>

As to the law’s mechanics, the RLA calls for “a lengthy process of bargaining and mediation” under the auspices of the National Mediation Board (the “NMB”),<sup>176</sup> and creates an elaborate machinery comprised of notices, negotiation and bargaining, mediation, voluntary binding arbitration, “cooling off” periods, and even the possibility of Presidential intervention.<sup>177</sup> And while this multitude of remedies are being exhausted, the federal statute still imposes a stringent obligation upon both employers and employees to make all reasonable efforts to negotiate, “and to refrain from altering the ‘status quo’ by resorting to self-help,” i.e., a strike or job action by workers or a lockout or similar move by management.<sup>178</sup>

Judge Marrero echoed the Supreme Court’s mantra that the rigors of this process subjects both sides of a major labor dispute to an unending cycle of negotiations,

mediation, arbitration, and conciliations, deliberately long and drawn out, the obvious purpose to let cooler heads prevail and reach an agreement. This interminable process has yet another goal --- to deny parties access to self-help, since that avenue is forbidden to them until the inexhaustible is in fact exhausted.<sup>179</sup>

Thus, the NWA court summarized the three linchpins of the RLA, as follows: a) the law's paramount goal is to resolve labor strife without disrupting commerce; b) self-help is strictly prohibited until the myriad of endless procedures are exhausted; and c) the NMB, a neutral yet ostensibly the watchdog of the public interest, plays a "vital role" here.<sup>180</sup> Notably, in the case at bar there was no dispute that the airline and the flight attendants were immersed in the interminable statutory process when the AFA threatened to unleash CHAOS.<sup>181</sup>

Next up for discussion was the NLGA, enacted in 1932. At base, this law deprives federal courts of the jurisdiction to enjoin the activity of labor unions,<sup>182</sup> specifically by prohibiting the issuance of restraining orders or injunctions, be they temporary or permanent in scope.<sup>183</sup> Broadly, the NLGA is aimed to prevent the abuse of injunctive remedies in labor disputes, in order to forestall judicial interference with the natural dynamics of labor and management interplay.<sup>184</sup> Nonetheless, this sweeping impediment does not necessarily bar injunctive relief granted to aid in the enforcement of other labor laws and other such limited circumstances.<sup>185</sup>

Third, Judge Marrerro turned to parse the NLRA, as enacted in 1935, and the junior of three statutory schemes discussed so far.<sup>186</sup> In the main, the NLRA expressly protects the rights of employees to strike in certain industries.<sup>187</sup> Of crucial note, the NWA court found the NLRA to be of minimal importance, because "the RLA, not the

NLRA, governs railways and airlines and establishes a lengthy and entirely separate dispute mechanism for those industries.”<sup>188</sup>

Finally, the NWA court arrived at the last of this quartet of intersecting federal law, that of course being the Bankruptcy Code. With laser-like precision, the court focused on the only two bankruptcy attributes relevant to the instant controversy.

First, there was the paradigm of Chapter 11. “[T]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”<sup>189</sup> Appropriately enough, this cornerstone of the modern Code came from the landmark Bildisco case, which begat Section 1113 of the Code,<sup>190</sup> the second aspect of bankruptcy law so critical to this case.

Reviewing its history, Judge Marrero reminds us that Section 1113 was legislated in 1984, less than five months after and quite truly in response to the Supreme Court’s holding in Bildisco permitting the wholesale abrogation of labor contracts as executory contracts.<sup>191</sup>

Section 1113, which applies to airline labor contracts (but not railroad accords),<sup>192</sup> codified “a more stringent standard” to be met before a Chapter 11 debtor could abrogate a troublesome collective bargaining agreement. While the AFA had never contended that the debtor had failed to fulfill Section 1113 in any respect, Judge Marrero correctly decided that further explication of the statute would be most helpful in understanding how all had arrived at the present day.<sup>193</sup>

Any attempt to cast aside a labor contract pursuant to Section 1113 requires three preconditions, said the NWA court. One, the debtor may only propose to modify an existing accord to the extent necessary to foster a successful reorganization and such

changes treat all so affected fairly and equitably. Two, the affected labor union must have refused to accept the modifications the debtor has proposed, but lacked good cause behind its refusal. Three, the equities clearly favor the rejection of the pact.<sup>194</sup> To be sure, the debtor cannot act unless and until the bankruptcy court approves the sought-after rejection.<sup>195</sup>

Yet, there is even more in the statute to protect the sanctity of a collective bargaining agreement, and save it from unnecessary or unjust manipulation. Section 1113 burdens the debtor by compelling it to first make its proposal for change to the union, and provide necessary information to the union so it might fairly evaluate what is on the table.<sup>196</sup> But disclosure, no matter how fulsome, is not enough. The proposed step is followed by a requirement that the debtor “confer in good faith” with the union in order to reach mutually satisfactory amendments to the CBA.<sup>197</sup> Quite naturally, a hearing bringing together all interested parties must then be held.<sup>198</sup> Then, and only then, may the bankruptcy judge lawfully enter an order approving the rejection of a labor contract in a Chapter 11 case.<sup>199</sup>

And now with the statutes laid out for all to see, Judge Marrero focused on what truly made NWA so controversial and so public --- a complete lack of guiding precedent. Neither the parties nor the district court’s own research could locate a precedent “directly on point, that squarely addresses the intersection of all four statutes in the precise factual posture” of this case.<sup>200</sup> Put simply, no prior case ever resolved whether or not debtor and union covered by the RLA might strike subsequent to a Section 1113 rejection of a CBA.<sup>201</sup>

To be sure, said the court, some nonbankruptcy cases addressed the enjoining of a strike in a RLA context, despite the anti-injunction restraints of the NLGA.<sup>202</sup> Other courts have confronted NLRA cases and requests for injunctions therein, but those matters never implicated the RLA.<sup>203</sup>

Such distinctions were not lost upon the NWA court. Judge Marrero forcefully declared “these cases may implicate a different set of policy concerns than those embodied in the RLA.”<sup>204</sup> Indeed, the court took time to thoroughly canvas the precedents that did exist, yet carefully explicated each one to amply demonstrate why each did not truly answer the dilemma posed on the instant appeal.<sup>205</sup> And that is why, just like the bankruptcy judge below, District Judge Marrero plainly and correctly declared this was case of first impression.<sup>206</sup>

District Judge Marrero posited the first issue before him to be as follows: “[t]he [c]ourt must examine when, under these interrelated statutory schemes, a resort to self-help in a labor dispute subject to the RLA would be allowed,” “self-help” of course being a labor strike or similar action, as in fact contemplated by the AFA with its CHAOS strategy in the instant case.<sup>207</sup>

As a general matter, the NWA court found self-help available only if and when the virtually endless bargaining procedures called for by the labor statute were fully exhausted.<sup>208</sup> Equally so, said the court, self-help is forbidden prior to said exhaustion of the bargaining process, and any attempt to upset the status quo by either side may be enjoined.<sup>209</sup>

The flight attendants here had argued that a unilateral change to the status quo by one side would automatically terminate the intricate statutory bargaining procedures,

thereby freeing the other side to engage in self-help. Judge Marrero thought this point merited some examination, primarily because some Supreme Court precedent suggested that if one side to a RLA labor dispute departed from the status quo, the opposite side was free to respond in kind.<sup>210</sup>

However, the NWA court refused to take such language out of context, for in fact, in that prior case, the employer was indeed enjoined from changing the status quo, as the railroad's call to restrain the union from striking was rejected.<sup>211</sup>

Notably, found Judge Marrero, the high Court's ruling in Con Rail yielded a consistent result. There the Justices merely adhered to the doctrine that self-help only becomes available after the exhaustion of all RLA bargaining procedures, and until then both labor and management must follow the status quo, even if that means by force of an injunction.<sup>212</sup> To be sure, the Supreme Court there "did not expressly state that violation of the status quo by one party automatically triggers the corresponding ability of the other party to respond in kind."<sup>213</sup> The NWA court found "a fundamental difference" between holding both employer and employees under equal restraint, as compared to saying when one side is not restrained, the other is free to act as it sees fit.<sup>214</sup> Judge Marrero found in all this the guiding principle for RLA cases that injunctive relief may be used to restraint a noncomplaint side, but not to allow a "free-for-all for both sides."<sup>215</sup>

Ancillary support for this proposition could also be found from the "clean hands" doctrine of the NLGA, to wit, a party seeking to enjoin an adversary must itself be in compliance with all applicable labor laws.<sup>216</sup> Case in point – the Eastern Air Lines bankruptcy, where another New York district judge rejected management's request to enjoin a labor strike when the airline's hands were rendered "unclean" because of its

refusal to arbitrate, contrary to the NLGA.<sup>217</sup> The NWA court found it noteworthy that Eastern's workers also only struck after the exhaustion of all RLA dispute procedures.<sup>218</sup>

This led the NWA court to the following critical holding: "a right to strike does not arise where an employer acts in a way that technically may be deemed unilateral but actually is permitted by the RLA or has been authorized by operation of law."<sup>219</sup> Judge Marrero drew this precept from, among others, Bildisco, and the Supreme Court's observation therein that the debtor's action did not violate the NLRA because it was done pursuant to the operation of law.<sup>220</sup>

At the end of the day, what this district judge took from all the precedents is that a union cannot strike until all the RLA bargaining procedures are truly exhausted or management undeniably acts in bad faith, capriciously or in violation of the law. Indeed, the last stains the employer with unclean hands, thus denying it the right to pursue injunctive relief to prevent a strike. The NWA court powerfully concluded that "action taken in compliance with the law does not constitute such arbitrary, unilateral or unlawful action that could trigger such right on the union's part" to strike.<sup>221</sup>

It was now time to place the foregoing in the context of bankruptcy law and procedure. To be sure, self-help in the form of modifying or abrogating a CBA prior to bankruptcy court approval is clearly not allowed.<sup>222</sup> "Yet here," said the NWA court, the airline "implemented changes after Bankruptcy Code approval."<sup>223</sup> This fact was crucial, because the AFA claimed that the Section 1113 order gave the union the right to strike. In sum, the union believed the operation of the Bankruptcy Code statute either terminated all RLA bargaining procedures or violated the status quo, freeing the workers to strike, and thus avail themselves of such self-help as they choose.<sup>224</sup>

In support of this theory, the AFA first argued that employees have engaged in numerous strikes against RLA carriers in bankruptcy without being enjoined.<sup>225</sup> However, Judge Marrero found that each case cited by the union did not address the precision situation at issue here: the legality of a strike following a Section 1113 rejection.<sup>226</sup>

For instance, in In re Continental Airlines, a bankrupt airline moved to reject its labor contracts pursuant to Section 365; that same day, the airline instituted new work rules, and the pilot and flight attendant unions called strikes.<sup>227</sup> Not only did this fact pattern entail a situation where the employer changed terms and conditions prior to bankruptcy court approval, and thus acted unilaterally in every sense of the word, furthermore the issue of whether the strike was lawful was not before the court.<sup>228</sup> In Eastern Airlines, another case relied upon by the union, the employer by contrast had failed to comply with the NLGA's "clean hands" provision, in refusing to arbitrate prior to seeking an injunction.<sup>229</sup>

These cases do not address the legality of a strike, said the NWA court, but instead assess whether a Section 1113 rejection is appropriate. Each merely assumed that a strike could occur following that rejection.<sup>230</sup> Thus, found Judge Marrero, no statutory or case law authority explicitly holds that a Section 1113 rejection, where there is no evidence of arbitrariness, bad faith, or other unlawful act on the carrier's part, automatically terminates the intricate RLA bargaining process, giving the union the right to strike.<sup>231</sup>

In this vacuum, the bankruptcy court's conclusions could not hold. The NWA court was not persuaded that a debtor's actions pursuant to Section 1113 are taken in bad

faith, arbitrary, or unlawful. First, the union's theory would place the determination of when the parties are released to engage in self-help in the hands of the bankruptcy judge. Second, it would create a conflict between RLA sections that would lead to anomalous results. Third, it does not take into account the fundamental policy concerns and purposes of the RLA nor Section 1113 in the context of an insolvent carrier.<sup>232</sup>

Following the foregoing exposition of the four statutory schemes and the relevant precedents (or lack thereof), the NWA court now moved to demonstrate why the AFA's position and the bankruptcy court's failure to act were both wrong. Judge Marrero did not mince words in finding these earlier views not only failed to harmonize at least two of the statutory bodies, they indeed "create[d] conflict [and]... several anomalies" between the RLA and the Bankruptcy Code, in numerous and diverse ways.<sup>233</sup>

One: if the bankruptcy court's finding was upheld, NWA, as an insolvent carrier in Chapter 11, would be deemed to have violated the RLA negotiating process simply because it exercised relief granted it by Section 1113 of the Bankruptcy Code.<sup>234</sup> Judge Marrero opined it was nonsensical to hold the debtor violated its RLA obligation to bargain by implemented the contract abrogation rights the Section 1113 process bestowed.<sup>235</sup>

If that were true, the NWA court concluded, then any debtor/airline resorting to Section 1113 procedures would be in violation of the RLA, and any duly entered Section 1113 judgment could be enjoined. This would produce "a bizarre result that manifestly Congress could not have envisioned."<sup>236</sup> Gathering strength from the Bildisco credo that a debtor could not violate the NLRA by employing lawful Bankruptcy Code procedures,<sup>237</sup> the NWA court found the debtor/airline had "acted lawfully, with express

statutory and judicial authorization in altering the status quo pursuant to [Section] 1113.”<sup>238</sup>

Second: to say that a debtor’s exercise of Section 1113 procedures and prerogatives unleashes a union from all restraint, and opens the floodgates to self-help via a strike, commits not one, but two transgressions. It destroys the RLA’s goal of preventing strikes, and next undermines Chapter 11’s objectives to permit a reorganizing debtor to continue to operate and restructure successfully. It is beyond peradventure that the power to reject a CBA pursuant to Section 1113 is vital to business reorganization.<sup>239</sup> Thus, NWA concluded that “[a]llowing an insolvent carrier to suffer a strike because it has implemented contract modifications under the authority of the bankruptcy court, that are determined to be necessary to the carrier’s reorganization, undercuts the purposes of both the RLA and the Bankruptcy Code.”<sup>240</sup>

Indeed, such a wrongheaded construction of Section 1113 “creates unjustifiable differences in treatment between solvent and insolvent carriers” in RLA negotiations.<sup>241</sup> A union cannot strike the former without violating RLA strictures; yet the same labor organization can strike the latter entity if it dares move to exploit its rights given by Congress in Section 1113. [Id. at 368.] And this is to say nothing about the detrimental chilling effect upon the troubled carrier, which by far needs the greater leeway in which to operate, if it is to survive. Judge Marrero implicitly frowned upon such an interpretation that would nullify what Section 1113 intends, especially since such erasure would even harm the similar goals of the RLA to foster labor peace, and maintain reliable transportation operations.<sup>242</sup>

In a scathing rebuke, the NWA court found the earlier characterization of Section 1113 transformed the remedial statute into “a suicide weapon.”<sup>243</sup> A carrier in Chapter 11 could certainly seek a Section 1113 remedy, merit it, and even receive such relief from the bankruptcy court. But the moment it “pulled the trigger,” the union could strike, thereby bringing operations to a halt, and in all likelihood dooming the reorganization to failure.<sup>244</sup>

The other option is equally fatal, found the court. The insolvent airline can forego Section 1113 relief, inviting endless negotiations pursuant to the RLA, until the weight of the burdensome CBA finally breaks the debtor, its Chapter 11 fails, and air transport is interrupted (and yet another RLA goal is thus thwarted).<sup>245</sup> Either way, the debtor is doomed. This could not possibly be what Congress intended, indicated NWA.<sup>246</sup>

Next, it was time for the NWA court to reconcile, if even possible, the differing statutory bodies of the RLA and the NLRA. This was due in large part to the AFA’s assertion that the NLRA cases it relied upon were equally apropos to the instant RLA case, and more so the broader labor act gave the union a greater right to strike than the railway labor law.<sup>247</sup>

However, Judge Marrero disagreed. He cautioned because of fundamental differences in the purposes and schemes of these statutes, parallels between the two laws must be drawn with care. While the NLRA might provide useful analogies, it cannot be imposed wholesale upon the railway labor code. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.<sup>248</sup> The relationship of labor and management in the railroad industry has developed on a

pattern different from other industries, said Judge Marrero. The fundamental premises and principles of the RLA are not the same as those of the NLRA.<sup>249</sup>

First, the RLA was passed 1926, and amended in 1934. The NLRA was enacted in 1935.<sup>250</sup> Congress clearly did not amend the RLA, although it could have done so. Instead, it created the NLRA as a separate statutory scheme for non-railroads, and expressly carved out employers and employees subject to the RLA from the junior law's coverage.<sup>251</sup> "Congress thereby signaled its intent to treat railroads (and later airlines, by amending the RLA in 1936 to bring airlines within its scope) differently than other industries," said Judge Marrero.<sup>252</sup> Congress placed the railroad and airline industries in a unique statutory framework, different from any other industry, declared the NWA judge.<sup>253</sup>

The NWA court found that one of these fundamental differences in treatment implicates when the right to strike accrues. The NLRA expressly protects the right to strike.<sup>254</sup> In counterpoise "the RLA contains no such express provisions and, while not removing a union's right to strike once its procedures are exhausted, imposes an elaborate, almost interminable process before such right to strike accrues."<sup>255</sup> Thus, each statutory scheme reflects starkly different policies. The NLRA effectively legislates that "there is no general federal anti-strike policy."<sup>256</sup> Yet in the railroad and airline industries, the RLA embodies precisely such a anti-strike policy.<sup>257</sup>

Judge Marrero drew other salient distinctions key to his analysis, pointing out that while the NLRA is concerned with promoting "industrial peace," it is not concerned with increasing stability in the transportation industry.<sup>258</sup> "The NLRA therefore does not limit disruption in certain industries by preventing strikes through channeling all disputes into

an almost interminable dispute resolution procedure of arbitration and mediation.” Yet, in contradistinction, that is precisely what the RLA is designed and intended to do.<sup>259</sup>

And now reconciling that to the relevant Bankruptcy Code provision, the NWA court declared “[b]ecause the NLRA expressly protects the right to strike, any prohibition on striking arises from contract; when that contract is rejected under Section 1113, that prohibition is removed and, arguably, the employees may be permitted to strike.”<sup>260</sup> By contrast in RLA cases, the prohibition on striking does not arise from the collective bargaining agreement, “but from the underlying policy of RLA itself to prevent strikes that could disrupt commerce.... [T]he status quo remains upon expiration of a collective bargaining agreement and the parties must negotiate for change pursuant to its procedures.”<sup>261</sup> In sum, NWA concludes that the RLA’s fundamental concern, that of preventing disruption to the transportation industry by requiring an almost endless bargaining and mediation process, distinguishes it from the NLRA, and makes cases decided under the latter statute distinguishable and, in fact, inapplicable.<sup>262</sup>

Now the NWA court was faced with its greatest task, to face a situation in which it “ha[s] no choice but to trace out as best [it] may the uncertain line of appropriate accommodation” of three (or even four) statutes “with purposes that lead in opposing directions.”<sup>263</sup> Judge Marrero found his duty clear, and declared he was obliged to harmonize these overlapping statutes “to give effect to each one insofar as they are capable of co-existence and to preserve the sense and purpose of each, insofar as they are not manifestly incompatible.”<sup>264</sup>

Judge Marrero sought to first accommodate the NLGA to the RLA. To do so, the district court reminds of the axiom that the first body of law does not deprive the federal

courts of the jurisdiction to enjoin compliance with the second statutory scheme.<sup>265</sup> And while the NLGA suggests circumspection by the courts in allocating injunctive relief, it is at least equally plain that the specific mandates of the RLA overcome the generalities of the NLGA.<sup>266</sup> Therefore, to enforce the precise terms of the railway labor law, the federal courts do indeed have the requisite jurisdiction to compel obedience by means of injunctive measures.<sup>267</sup> In direct terms, “the RLA trump[s] the NLGA - - or at least that in order to accommodate both, the NLGA does not divest a court of jurisdiction to enjoin” violators of the RLA’s provisos.<sup>268</sup>

And in a footnote of understated power, Judge Marrero made the crucial holding that, in contrast, Section 1113 was passed after the NLGA, and embodies not just a general concern for the preservation of assets of the estate, but a specific, highly tailored method for carrying out that weighty concern beyond merely a stay, a remedy that gives the debtor judicial authority to modify the status quo.<sup>269</sup>

The NWA court then moved to reconcile the NLGA with the RLA’s specific Section 2 (First) proviso. Judge Marrero handily applied the norm of statutory construction that the specific, here the RLA, takes paramouncy over the general, that of course being the NLGA.<sup>270</sup> Therefore, the railway labor statutes could be enforced by injunctive relief, albeit with restraint so as not to offend co-existing federal labor law.<sup>271</sup>

It was now time, said the court, to apply the foregoing principles to the case at bar, and determine if an injunction against the union was needed to ensure compliance with the RLA’s demands to exhaust every effort to settle management/labor controversies before resorting to the strike option. Acknowledging this duty to seek voluntary peace first and foremost was the very essence of Section 2 (First), the NWA court at the same

time noted it had been left to the federal bench, working sui generis, to determine “the scope of its contours.”<sup>272</sup>

And so in these particular circumstances of a Section 1113 order authorizing the debtors to reject a collective bargaining agreement, where the parties are still in the RLA Section 6 procedures, the best way to accommodate the competing demands of the Bankruptcy Code and the RLA is to conclude that injunctive relief is proper. This is especially so where, as here, the bankruptcy court has determined that such rejection is necessary to an insolvent carrier’s reorganization, is fair and equitable to all parties, and the proposal to modify the agreement was defeated by the employees without good cause, and such modification does not constitute an act of bad faith, or an arbitrary or otherwise unlawful unilateral change of the status quo.<sup>273</sup> Finding the status quo unchanged, the NWA court ruled that the union was therefore not free to strike. Quite to the contrary, the RLA demands it remain at the bargaining table and stay off the picket lines.<sup>274</sup>

The district court drew a sharp contrast here. It is true that the RLA mandates all “reasonable” efforts be made by labor and management to pursue almost endless negotiations. In turn, “reasonable” is a flexible concept and highly dependent upon the circumstances. Judge Marrero made the obvious distinction between what constitutes “reasonable” in the context of maintaining the operations of a solvent carrier in contradistinction to an insolvent one.<sup>275</sup>

The troubled airline is clearly much more vulnerable financially, observed the district court, and therefore the potential consequences of a disruptive labor action are raised by an order of magnitude. To be sure, aggrieved unions hold the strike dear as a weapon precisely for that reason: its value in holding the employer at economic risk. But

in exquisite counterpoise, found Judge Marrero, is Congress' overarching concern that the insolvency of a cog in the nation's transportation machine can wreak havoc in the airways.<sup>276</sup> This, in turn, mandates a modified view of "reasonableness," justifying the veritable chaining of parties to the bargaining table, and possibly greater freedom to order injunctive relief aimed at preventing the disruption of a commercial carrier's operations while it battles its way through Chapter 11.<sup>277</sup>

Weighting the relative pros and cons, NWA simply found it "would be especially disproportionate" to this carrier vis-à-vis its union to permit the latter to strike the insolvent former, and potentially drive the debtor/airline into liquidation. Add to that the unavoidable disruption to commerce (which the RLA statutes are in fact designed to forestall and prevent) that would follow interrupted or abandoned operations, and here the court found ample justification to issue injunctive relief.<sup>278</sup>

It was furthermore crucial that "the AFA did not challenge the findings of the [Section] 1113 Order," nor did the union seek release from the RLA's duties to bargain, mediate, and then bargain and mediate some more. The federal labor act does not countenance such a unilateral abandonment of the bargaining process, found the NWA court.<sup>279</sup>

Accommodating Section 1113 and the RLA demands both labor and management continue to exercise the fully panoply of the labor law's endless cycle of reconciliation, without respite.<sup>280</sup> In sum, Judge Marrero held that a Section 1113 rejection of a CBA does not abrogate the RLA's requisites to bargain; rather those requirements are still in full force and effect, and a preemptory strike by the union could not be countenanced.<sup>281</sup>

Now to the final conundrum: harmonizing the RLA and the Bankruptcy Code. Judge Marrero ventured into this realm well armed with the maxim that the court must give maximum effect to both, at least to the extent they are not mutually repugnant.<sup>282</sup> To accomplish this, the NWA court first reviewed the essentials of Section 1113.<sup>283</sup>

To begin, by operation of Section 1113 itself, the rejection of a collective bargaining agreement can occur only after the debtor demonstrates that rejection is necessary to its successful reorganization, is fair and equitable, and the proposed modifications have been refused by the union without good cause. Allowing a strike in such circumstances would undermine the purposes of the Bankruptcy Code as well as the RLA.

On the other hand, enjoining a strike here on this basis would be true to the goals of both the RLA and the Code (and still not contrary to the NLGA), insofar as the RLA would control under these circumstances.<sup>284</sup> Reconciling the RLA and the Bankruptcy Code in this manner is consistent with the purposes of both, as the railway law embodies a strong policy of protecting the nation's carriers from work stoppages, with strikes rarely permissible, while the Bankruptcy Code embodies a strong policy in favor of reorganization.<sup>285</sup>

Therefore, the NWA court concluded, when a debtor obtains authority under Section 1113 to modify the terms and conditions of a CBA, this undeniable principle follows: the debtor, by acting legally to obtain the benefits of one statute, cannot be found to violate the other. To hold so would illogically and unfairly undermine any benefit the debtor otherwise obtains via that bankruptcy statute.<sup>286</sup>

Judge Marrero found that where a carrier in reorganization chooses to avail itself of a statutory reprieve - -“a helping hand that Congress itself extended to the carrier as a means to remain solvent,” the airline’s action should not be deemed an arbitrary, unilateral contractual change, but a temporary remedial measure taken by operation of law.<sup>287</sup> NWA’s actions, “taken in the context of its reorganization proceeding, and subject to the strict oversight, supervision, and approval of the bankruptcy court, cannot be deemed the type of bad faith or arbitrary action that would justify termination” of RLA procedures and justify a strike by the AFA.<sup>288</sup>

“To hold that under these circumstances the carrier’s resort to a statutory remedy releases the union automatically to declare and wage a war that ends the Section 6 process, would interrupt commerce and could lead to a liquidation of the insolvent carrier.”<sup>289</sup> Section 1113 would then no longer be a remedial measure “but a means of the insolvent carrier’s self-destruction, contrary to the purpose of both the RLA and the Bankruptcy Code.”<sup>290</sup>

Classifying the debtor’s lawful pursuit of labor contract rejection under the Bankruptcy Code as a violation of a labor law provision would collide head-on with not only express provisions of the Bankruptcy Code, but more importantly with the overall objective of fostering reorganizations.<sup>291</sup> “By the very existence of Section 1113, Congress has given the rehabilitative goal of Section 1113 precedence over labor law in order to permit rejection of collective bargaining agreements.”<sup>292</sup>

Yet “[h]ere,” found the NWA court, “the parties have not formally exhausted the status quo procedures.”<sup>293</sup> Moreover, the duty of following those procedures, said Judge Marrero, must be interpreted in light of this airline operating subject to Section 1113

specifically and Chapter 11 overall. Therefore, the court concluded there exists “an implied limit on the union’s ability to strike” for reason of Section 1113, “which expresses a Congressional intent to allow rejection of collective bargaining agreements.”<sup>294</sup>

To be sure, NWA did not find the bankruptcy statute to mark the end of the requisite negotiating process. “Section 1113 does not dispense with a carrier’s obligation to negotiate even after rejection of its collective bargaining agreements.” The relevant portion of the RLA mandates that bargaining continue, and in good faith. And this obligation extends to labor and management alike.<sup>295</sup>

As posited by Judge Marrero, a modification or outright rejection of a CBA in a Section 1113 context is “essentially temporary,” lasting only until the next contract. “[W]hat the union lost [via Section 1113] potentially could be restored or mitigated” in a subsequent accord. “If, ultimately, there is an impasse, then after the process is exhausted the parties may engage in self-help.... “[T]he union thus does not lose its right to strike.” The weapon of a work stoppage is “only deferred.”<sup>296</sup>

Indeed, even the interminable negotiating process of the RLA must some day end, and thereafter the union would be free to engage in self-help by means of a strike. But in the meantime, the ongoing negotiation and mediation required by the railway act affords an opportunity for consensual resolution without resort to a work stoppage.<sup>297</sup>

The NWA court found its solution to this thorny problem “consistent with the policies and purposes of each of the four statutes at issue here.” It is consistent with the RLA because it discourages strikes and interruptions to the transportation industry. It is consistent with the Bankruptcy Code because it encourages a resolution that promotes

reorganization. To the extent that the NLRA is relevant to this dispute, it is consistent in recognizing the fundamental differences between the labor dispute regimes created by Congress for public carriers and for other industries. Finally, it is consistent with the NLGA because that statute does not bar injunctions against violations of other labor laws.<sup>298</sup>

The outcome was furthermore consistent with Supreme Court precedent that called for the NLGA to accommodate the RLA, said Judge Marrero, in that the obvious purpose of each statutory body is fulfilled.<sup>299</sup> It must be remembered, held the NWA court, that the RLA prescribes special processes, reflecting the unique circumstances of the railroad and airline industries.

The compromises the law reaches in its own particular application does not simply strip labor of the strike as an economic weapon; rather, it substitutes the beneficial alternative of continued negotiation.<sup>300</sup> In NWA, the flight attendants, even if denied the right to strike at present, still maintained the remedy of RLA bargaining, and only deferred the self-help of a strike to that day, if ever, when all negotiations are exhausted.<sup>301</sup>

It was now time to put the foregoing legal principles to use in NWA. Judge Marrero concluded that while the bankruptcy court erred when it found itself without jurisdiction to enjoin a strike, its factual findings were eminently supportable, and therefore not clearly erroneous. The evidence so adduced below clearly showed that the AFA's threatened CHAOS strike would be so injurious to the airline, it might lead to a liquidation, and the attendant harm to the public interest.<sup>302</sup>

Second, the Section 1113 order that was pivotal to the current dilemma was, while controversial, nonetheless necessary, fair and equitable, and had been rejected by the union without good cause. Most of all, it was never appealed. Thus, it was now beyond refute.<sup>303</sup>

Lastly, the RLA's Section 6 process of negotiation had not yet concluded, and therefore a strike was still forbidden to the employees. The threatened strike by the AFA could be justifiably enjoined as violative of the RLA's duty to bargain, and thus it was error for the bankruptcy judge below to say he lacked the jurisdiction to enjoin a strike. In other words, self-help was not an option for this union, and a federal court could rightly foreclose that course of action.<sup>304</sup>

In sum, Judge Marrero remanded the case, now that he had declared the bankruptcy court held jurisdiction to order injunctive relief. The NWA court furthermore issued a preliminary injunction to hold the parties in check, given that the elements of irreparable harm, among others, were present, and the prerequisites for injunctive relief were thereby met.<sup>305</sup>

And there we have it; the next true landmark in bankruptcy jurisprudence, not to mention federal labor law. Here is a case of first impression, one requiring a delicate balancing of four separate but equal promulgations of federal law, all to be decided in the supercharged air of intense public scrutiny.

Yet District Judge Marrero masterfully conducted his in-depth yet cogent synthesis with great dexterity, leading him to the proper conclusions, in the main by adhering to the basic norms of statutory construction: to read and apply the laws as

plainly written; to give full effect to each, while not permitting absurd results nor the cancellation of one law to promote a different statute.

As daunting as the task was, and the complexity readily apparent, NWA rendered the right results for the right reasons. Judge Marrero dispensed justice as to what the RLA specifically demanded, without offending its companion bodies the the NLGA and the NLRA. Each to its own task, as intended by Congress, one might say.

But most of all, NWA gave full effect to Section 1113, but without transgressing upon any other statutory enactments. Indeed, NWA placed the entire controversy in exquisite perspective, because its central holding was that the rejection of a labor contract, properly done before a bankruptcy court, in accord with the many strictures of the statute, and duly approved by a bankruptcy judge, could never be deemed the kind of unlawful or unilateral act that would trigger other, more draconian forms of relief available under federal labor law.

For the penultimate point, as made so well here, is that a Section 1113 labor contract rejection would be illusory, and the statute rendered impotent, if such action could be undone by resort to another proviso of federal law. In the final analysis, Section 1113 remains unbowed, and stands vigorously as a vital tool in implementing Chapter 11 reorganizations.

### Mesaba III: Progeny of NWA

NWA was of course a case of first impression. Yet it soon gave birth to a following, ironically one inextricably linked to its own bankruptcy reorganization.

As already exposted herein, Mesaba Airlines is the child of its corporate parent, NWA, in a symbiotic relation inimical to the airline industry, whereby the former is a

“feeder airline” to its larger benefactor. So it is fitting that District Judge Marrero’s groundbreaking decision in NWA was followed approximately two months later by what we shall call Mesaba III.<sup>306</sup> And like any good progeny, the offspring followed in its parent’s footsteps, for Mesaba III likewise resulted in an injunction against the debtor’s unions, by invoking the RLA to enjoin any strike or other self-help by the union.<sup>307</sup>

Given the similarities that abound between NWA and Mesaba III, we will merely highlight the most worthy points of the latter. Not surprisingly, the forces of labor that opposed the debtor’s cost savings measures were the same, and once again they threatened to implement their work stoppage and/or interruption scheme, so aptly called “CHAOS.”<sup>308</sup> The Mesaba III court held that the impact of such strike action upon the debtor could be “devastating,”<sup>309</sup> as well as the harm to the public, given the essential role of this regional carrier to the smaller communities to which it provided airline service.<sup>310</sup> The court also found that the two sides were very much in the throes of Section 6 negotiations as mandated by the RLA.<sup>311</sup>

Now turning to the legal discussion, Chief Bankruptcy Judge Kishel openly noted that “[t]his is only the second time that a controversy of this type at bar has been presented to a court.” Mesaba III ironically points out “[t]he first time was not too long ago and (figuratively) not too very far away,” of course referencing parent NWA.<sup>312</sup> Lavishing high praise for the “thoughtful and cogent” reasoning of New York’s Southern District, this Minnesota bankruptcy court unsurprisingly used NWA “as both a springboard and structure,” for its own decision here.<sup>313</sup>

Framing the issues before it, in essentially the same manner as the sole precedent available,<sup>314</sup> the Mesaba III bench point by point dissected the NLGA, the RLA and the

Bankruptcy Code,<sup>315</sup> and, in turn, applied their strictures to the debtor and its unions. To be sure, Mesaba III rejected out of hand any thought of starting out from scratch, “given the relative similarities” here to NWA, the “comprehensiveness” of the NWA decision, and “the extreme exigencies of time” that denied the luxury of a new “building-from-bricks” approach.<sup>316</sup>

Thus, the result of Mesaba III was identical, predictable, and inevitable. The unions were prohibited by the RLA from striking, the debtor’s steps to exercise its Section 1113 rights did not free the unions to pursue self-help, and the NLGA’s more general provisos had to fall to the specific mandates of the RLA, in particular those calling for nearly endless negotiations in the transportation industry, as aimed precisely at foreclosing disruptive strikes.<sup>317</sup> And so injunctive relief was issued, and a work stoppage at the debtor airline was averted.<sup>318</sup> Like father, like son, are NWA and Mesaba III.

### Conclusion

“Watch the skies” is a famous warning phrase drawn from the ranks of the cinema. Yet it resonates just as far and wide where today’s airline industry crash lands into our federal bankruptcy courts. As the foregoing pages have so aptly illustrated, the consequences of the insolvency cases of major air carriers profoundly impact not only that industry, but America’s entire transportation infrastructure. The precedents so established likewise make a deep impression upon the Bankruptcy Code as well. But most of all, the past year will long be remembered when airline bankruptcies asked and answered novel questions, with a far ranging impact upon the entire symbiotic relationship between American labor, corporations and their management, and the

national laws that the actions of both are measured against. We can only be thankful that the results so obtained were the right ones, and will inure to the benefit of America as a whole.

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<sup>1</sup> See Sabino, “Flying the Unfriendly Skies: A Year of Reorganizing Airlines, Aircraft Lessors, and the Bankruptcy Code,” 57 *Journal of Air Law and Commerce* 841 (1992), cited by Ripple, “Special Protection In the Air[line Industry]: The Historical Development of Section 1110 of the Bankruptcy Code,” 78 *Notre Dame Law Review* 281 (2002) and Clark, “Flying At Risk: How Should Bankruptcy Interact With Aviation Safety Enforcement,” 12 *Bankruptcy Developments Journal* 845 (1996).

<sup>2</sup> See, i.e. Fedor, “NWA Seeks Claim for Employee Stockholders,” (Friday, February 16, 2007), *Minneapolis Star Tribune*; Isidore, “US Air Ends \$20 Billion Bid for Delta,” (Wednesday, January 31, 2007) *CNNMoney.com*; Jean, “NWA Still Needs To Fill In Blanks,” (Saturday, January 13, 2007), *St. Paul Pioneer Press (Minnesota)*.

<sup>3</sup> In truth, aircraft have “collision avoidance systems” or “anti-collision warnings,” and so forth. The above title’s phrase “sound collision” is actually a nautical term, denoting the sounding of a specific claxon to warn of an impending collision. Nevertheless, the close identity between ships of the sea and ships of the air make the analogy an apt one.

<sup>4</sup> 468 F.3d 444 (7<sup>th</sup> Cir. 2006).

<sup>5</sup> *Id.* at 447. See 443 F.3d 563 (7<sup>th</sup> Cir. 2006), cert. denied, \_\_\_ U.S. \_\_\_ (No. 06-8) (2007).

<sup>6</sup> *Id.* at 447.

<sup>7</sup> *Id.* at 447-48.

<sup>8</sup> *Id.* at 448-49.

<sup>9</sup> *Id.* at 449.

<sup>10</sup> *Id.* at 449. See 29 U.S.C. § 1342.

<sup>11</sup> *Id.* at 449.

<sup>12</sup> *Id.* at 449-50.

<sup>13</sup> *Id.* at 450.

<sup>14</sup> *Id.* at 451. See 29 U.S.C. § 1362.

<sup>15</sup> *Id.* at 451.

<sup>16</sup> *Id.* at 451.

<sup>17</sup> *Id.* at 451.

<sup>18</sup> *Id.* at 452.

<sup>19</sup> *Id.* at 452.

<sup>20</sup> *Id.* at 453.

<sup>21</sup> *Id.* at 454.

<sup>22</sup> *Id.* at 454.

<sup>23</sup> *Id.* at 454.

<sup>24</sup> *Id.* at 454.

<sup>25</sup> *Id.* at 454. See 29 U.S.C. § 1342(a)(4). See also *In re UAL Corp.*, 428 F.3d 677 (7<sup>th</sup> Cir. 2005).

<sup>26</sup> *Id.* at 454.

<sup>27</sup> *Id.* at 454-55. Similarly, such payments would be untenable as antithetical to the bankruptcy law’s commandments to treat all claimants equally. *Id.* at 455.

<sup>28</sup> *In re UAL Corp.*, 468 F.3d 456, 461 (7<sup>th</sup> Cir. 2006).

<sup>29</sup> *Id.* at 461 (citations omitted).

<sup>30</sup> *Supra*, 468 F.3d at 455.

<sup>31</sup> Collective bargaining agreements (“CBAs”) are “a cornerstone of our national labor policy,” *Airline Pilots Ass’n Int’l v. TACA Int’l Airlines, S.A.*, 748 F.2d 965, 972 (5<sup>th</sup> Cir. 1984).

<sup>32</sup> 11 U.S.C. § 1113. *In re Northwest Airlines Corp.*, 346 B.R. 307, 314 (Bankr. S.D.N.Y. 2006).

<sup>33</sup> Congress enacted Section 1113 to address a “dangerous imbalance in the collective bargaining process,” 130 Cong. Rec. H1831 (daily ed. March 21, 1984) (comments of Rep. Vento), and to prevent debtors “from

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using bankruptcy as a judicial hammer to break the union.” New York Typographical Union No. 6 v. Maxwell Newspapers, Inc., 981 F.2d 85, 89 (2d Cir. 1992) (“Maxwell”).

<sup>34</sup> 465 U.S. 513, 526 (1984) (“Bildisco”).

<sup>35</sup> 11 U.S.C. § 1113(b).

<sup>36</sup> Id.

<sup>37</sup> 11 U.S.C. § 1113(c).

<sup>38</sup> In re Sheet Metal Workers’ Int’l Association, Local 9 v. Mile Hi Metal Systems, Inc. (In re Mile Hi Metal Systems, Inc.), 899 F.2d 887, 891-92 (10<sup>th</sup> Cir. 1990) (“Mile Hi Metal”).

<sup>39</sup> 816 F.2d 82, 90 (2d Cir. 1987) (“Carey”).

<sup>40</sup> 791 F.2d 1074, 1088-89 (3d Cir. 1986) (“Wheeling-Pittsburgh”).

<sup>41</sup> Carey, supra, 816 F.2d at 89.

<sup>42</sup> Id.; See also New York Typographical Union No. 6 v. Royal Composing Room, Inc. In re Royal Composing Room, Inc., 848 F.2d 345, 348 (2d Cir. 1988) (“Royal Composing Room”).

<sup>43</sup> Id.; See also Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Gatke Corp., 151 B.R. 211, 218 (N.D. Indiana 1991) (“Gatke”) (the “Second Circuit’s longer term focus, which encompasses the ultimate success of reorganization rather than merely the avoidance of immediate liquidation, is more consistent with the statute”); Mile Hi Metal, supra, 899 F.2d at 892-93; In re Walway Co., 69 B.R. 967, 973 (Bankr. E.D.Mich. 1987).

<sup>44</sup> Royal Composing Room, supra, 848 F.2d at 348.

<sup>45</sup> Id.

<sup>46</sup> United Food and Commercial Workers Local Union Nos. 455, 408, 540 and 1000 v. Appletree Markets, Inc. (In re Appletree Markets, Inc.), 155 B.R. 431, 440 (S.D. Tex. 1993) (“Appletree”); see also In re Horsehead Indus., Inc., 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003) (proposed modifications to a collective bargaining agreement must be viewed as a whole).

<sup>47</sup> 11 U.S.C. § 1113(b)(1)(A).

<sup>48</sup> See Carey, 816 F.2d at 86 (approving rejection of collective bargaining agreements based on proposals including changes in health and pension benefits, work rules, workers’ compensation and disability, and scheduling and assignment rules); see also New York Typographical Union No. 6 v. Maxwell Newspapers, Inc., 981 F.2d 85 (2d Cir. 1992) (“Maxwell”) (guarantee of lifetime employment); Royal Composing Room, 848 F.2d at 350 (seniority clause); Century Brass Products, Inc. v. Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (In re Century Brass Products, Inc.), 795 F.2d 265 (2d Cir. 1986) (“Century Brass”) (retiree welfare benefits); Gatke, supra, 151 B.R. at 214 (transfer policies).

<sup>49</sup> See Appletree, supra, 155 B.R. 431 441 (S.D. Tex. 1993) (approving proposal with non-economic changes that were “intended to have a direct economic effect on [the debtor’s] ability to reorganize successfully by lowering its labor costs and improving its level of customer service”); see also United Food and Commercial Workers Union, Local 770 v. Official Unsecured Creditors Committee (In re Hoffman Bros. Packing Co., Inc.), 173 B.R. 177, 187-88 (9<sup>th</sup> Cir. B.AP. 1994) (approving proposal with non-economic changes that “related to the economic benefit of the debtor”).

<sup>50</sup> 11 U.S.C. § 1113(b)(1)(A).

<sup>51</sup> Carey, supra, 816 F.2d at 90 (quoting Century Brass, supra, 795 F.2d at 273); see also Wheeling-Pittsburgh, supra, 791 F.2d at 1091.

<sup>52</sup> See In re Allied Delivery System Co., 49 B.R. 700, 702-03 (Bankr. N.D. Ohio 1985).

<sup>53</sup> See Carey, supra, 816 F.2d at 90-91.

<sup>54</sup> See id.; see also In re Indiana Grocery Co., Inc., 136 B.R. 182, 194 (Bankr. S.D. Ind. 1990) (“[e]quity under § 1113 means fairness under the circumstances”); Walway, 69 B.R. at 974 (same).

<sup>55</sup> Carey, supra, 816 F.2d at 90.

<sup>56</sup> Royal Composing Room, supra, 848 F.2d at 349; see also Horsehead Indus., supra, 300 B.R. at 585.

<sup>57</sup> In re Delta Air Lines, 342 B.R. 685, 697 (Bankr. S.D.N.Y. 2006); In re S.A. Mechanical, Inc., 51 B.R. 130, 132 (Bankr. D. Ariz. 1985).

<sup>58</sup> Royal Composing Room, supra, 848 F.2d at 348.

<sup>59</sup> See In re Indiana Grocery Co., supra, 136 B.R. at 195-96.

<sup>60</sup> See Carey, supra, 816 F.2d at 92; Mile Hi Metal Sys., supra, 899 F.2d at 892 n. 6.

<sup>61</sup> See Maxwell, supra, 981 F.2d 85 (2d Cir. 1992).

<sup>62</sup> See Century Brass, supra, 795 F.2d at 273.

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<sup>63</sup> Carey, *supra*, 816 F.2d at 93 (citing Bildisco, *supra*, 465 U.S. at 525-26, 104 S.Ct. 1188).

<sup>64</sup> Bildisco, *supra*, 465 U.S. at 527; see also In re Kentucky Truck Sales, Inc., 52 B.R. 797, 806 (Bankr. W.D. Kentucky 1985) (“the primary question in a balancing test is the effect the rejection of the agreement will have on the debtor’s prospects for reorganization”).

<sup>65</sup> See Donald B. Smith and Richard A. Bales, Reconciling Labor and Bankruptcy Law: The Application of 11 U.S.C. § 1113, 2001 L.Rev. M.S.U.-D.C.L. 1145, 1171-72 (2001).

<sup>66</sup> 351 B.R. 67 (Bankr. S.D.N.Y. 2006).

<sup>67</sup> See 342 B.R. 685 (Bankr. S.D.N.Y. 2006).

<sup>68</sup> Supra, 351 B.R. at 70-72.

<sup>69</sup> Id. at 72.

<sup>70</sup> Id. at 72-73.

<sup>71</sup> Id. at 72-73.

<sup>72</sup> Id. at 74.

<sup>73</sup> Id. at 74-75.

<sup>74</sup> Id. at 75-76.

<sup>75</sup> Id. at 76.

<sup>76</sup> Id. at 76. See 11 U.S.C. § 1113(b)(2).

<sup>77</sup> Id. at 76-77.

<sup>78</sup> Id. at 77. See 11 U.S.C. § 1113(b)(1)(A).

<sup>79</sup> Id. at 77.

<sup>80</sup> Id. at 77.

<sup>81</sup> Id. at 77-78.

<sup>82</sup> Id. at 78. See 11 U.S.C. § 1113(c).

<sup>83</sup> Id. at 78.

<sup>84</sup> Id. at 78-79. The court added that the union’s declaration that it would not negotiate on this point, when contrasted to the fact that the debtor merely proposed these work rule changes, punctuated the union’s lack of good cause to contemplate Comair’s suggestions. Id. at 79.

<sup>85</sup> Id. at 79. See 11 U.S.C. § 1113(c)(3).

<sup>86</sup> Id. at 79.

<sup>87</sup> Id. at 79.

<sup>88</sup> Id. at 79.

<sup>89</sup> 330 B.R. 435 (D. Minn. 2006) (“Mesaba”).

<sup>90</sup> Id. at 444.

<sup>91</sup> Id. at 444.

<sup>92</sup> Id. at 443.

<sup>93</sup> Id. at 443.

<sup>94</sup> Id. at 443.

<sup>95</sup> Id. at 443-44.

<sup>96</sup> Id. at 444.

<sup>97</sup> Id. at 444.

<sup>98</sup> Id. at 445.

<sup>99</sup> Id. at 445.

<sup>100</sup> Id. at 446.

<sup>101</sup> Id. at 446-47.

<sup>102</sup> Id. at 447.

<sup>103</sup> Id. at 447.

<sup>104</sup> Id. at 448. See 11 U.S.C. § 1113.

<sup>105</sup> Id. at 448. See also In re American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (footnote omitted).

<sup>106</sup> Id. at 448 (citations omitted).

<sup>107</sup> Id. at 448.

<sup>108</sup> Id. at 449, citing Carey, *supra*, 816 F.2d at 90.

<sup>109</sup> Id. at 449; see Carey, *supra*, 816 F.2d at 89.

<sup>110</sup> Id. at 449, citing Wheeling-Pittsburgh, *supra*, 791 F.2d at 1088-89.

<sup>111</sup> Id. at 449.

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<sup>112</sup> Id. at 449.

<sup>113</sup> Id. at 449-50. The district court concluded the bankruptcy judge below correctly applied the appropriate precedent, and thus left the legal conclusion undisturbed.

<sup>114</sup> Id. at 450-51.

<sup>115</sup> Id. at 451.

<sup>116</sup> Id. at 452.

<sup>117</sup> Id. at 452. The district court further agreed that the requested six year duration of the cuts was a necessity, based upon Mesaba’s need to secure long term commitments with NWA and the mainline carriers. The requested time frame was in line with what competitors were doing, and there were ample examples of unions of other carriers entering into contracts of an identical time span. Id. at 452.

<sup>118</sup> Id. at 452-53.

<sup>119</sup> Id. at 453-54.

<sup>120</sup> Id. at 454-55.

<sup>121</sup> Id. at 455. See 11 U.S.C. § 1113(b)(2).

<sup>122</sup> Id. at 456.

<sup>123</sup> Id. at 456-460.

<sup>124</sup> In re Appletree Markets, 155 B.R. 431, 440 (S.D. Tex. 1993); In re Matter of Walway Co., 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987).

<sup>125</sup> In re Indiana Grocery, Co., Inc., 136 B.R. 182, 192 (Bankr. S.D. Ind. 1990). In order to meet the requirement of good faith bargaining under Section 1113, a debtor must at least consider the possibility of including a snap-back provision in its proposals. See In re Liberty Cab & Limousine Co., Inc., 194 B.R. 770, 776-77 (Bank. E.D. Pa. 1996) (refusing to approve Section 1113 proposal when, among other things, debtor refused to consider snap-back and directing parties to return to negotiations and consider “the propriety, if any, of the inclusion of a snap-back clause”); In re Garofalo’s Finer Foods, Inc., 117 B.R. 363, 373 (Bankr. N.D. Ill. 1990) (holding “the absence of snap-back provisions in the Debtor’s original proposals, in light of the undisputed evidence that it has been willing to negotiate same, is not fatal to the requested relief”) (emphasis added); In re Matter of Walway Co., 69 B.R. at 969, 974 (holding the debtor’s failure to agree to the union’s snap-back proposal did not prevent approval of the proposal, but noting that the debtor had “considered the proposal” and that the debtor’s Section 1113 proposal was based on best-case-scenario projections).

<sup>126</sup> See Mesaba, 341 B.R. at 753-54. When United Airlines recently emerged from bankruptcy, its executives received handsome compensation, including a quickly vesting bonus in the form of shares estimated to be worth \$115 million. Id. at 459, citing Gretchen Morgenson, Gee, Bankruptcy Never Looked So Good, N.Y. Times, Jan. 15, 2006, at 31.

<sup>127</sup> Id. at 460. See 11 U.S.C. § 1113(b)(1)(A).

<sup>128</sup> Id. at 460. (citation omitted).

<sup>129</sup> Id. at 460. See In re Electrical Contracting Services Co., 305 B.R. 22, 28 (Bankr. D. Colo. 2003).

<sup>130</sup> Id. at 460-61 and 461 n. 5.

<sup>131</sup> Id. at 461 (citations omitted).

<sup>132</sup> Id. at 461.

<sup>133</sup> Id. at 461.

<sup>134</sup> Id. at 462.

<sup>135</sup> Id. at 463.

<sup>136</sup> Id. at 465.

<sup>137</sup> In re Mesaba Aviation, Inc., 350 B.R. 105 (Bankr. D. Minn. 2006) (“Mesaba II”).

<sup>138</sup> Id. at 112.

<sup>139</sup> Id. at 111.

<sup>140</sup> Id. at 111.

<sup>141</sup> Id. at 111.

<sup>142</sup> Id. at 107.

<sup>143</sup> Id. at 107.

<sup>144</sup> Id. at 108.

<sup>145</sup> Id. at 108.

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<sup>146</sup> Id. at 109.

<sup>147</sup> Id. at 109-10.

<sup>148</sup> Id. at 110.

<sup>149</sup> Id. at 110-11.

<sup>150</sup> 349 B.R. 338 (S.D.N.Y. 2006).

<sup>151</sup> Id. at 343.

<sup>152</sup> Id. at 344.

<sup>153</sup> See, i.e., Bjorhus, “Union Insists On Right To Strike: Others Far From Certain,” (Wednesday, August 2, 2006), St. Paul Pioneer Press (Minnesota); Freed, “Northwest Fight With Union May Go to Court,” (Tuesday, August 1, 2006), Associated Press; Gopwani, “Preparing to Strike [Northwest] Airline Negotiations Reach Critical Point,” (Friday, July 14, 2006), Detroit Free Press; Freed, “NWA, Flight Attendants To Keep Talking,” (Tuesday, June 13, 2006), Associated Press; Moylan, “Turbulence Could Mar NWA’s Path,” (Saturday, June 10, 2006), Pioneer Press (Minnesota).

<sup>154</sup> Id. at 344-45.

<sup>155</sup> Id. at 345.

<sup>156</sup> Id. at 345. See F.C.C. v. NextWave Personal Communications, Inc., 537 U.S. 293, 304 (2003).

<sup>157</sup> Id. at 345.

<sup>158</sup> Id. at 345-46.

<sup>159</sup> Id. at 346. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975).

<sup>160</sup> Id. at 346. Here the court made an apparently intentional and graphic pun about the injustices of arranging statutory pieces to bring about a train wreck or a plane crash. Id. at 346.

<sup>161</sup> Id. at 346-47.

<sup>162</sup> Id. at 347-48. See 11 U.S.C. § 1113.

<sup>163</sup> Id. at 348-49.

<sup>164</sup> Id. at 349. The AFA called its plan “CHAOS,” as in “Create Havoc Around Our System,” and apparently took such pride in its cleverness that it trademarked the catchphrase and the acronym. Id. at 349. CHAOS is a strike program trademarked by the AFA, which has been upheld as lawful, see Association of Flight Attendants v. Alaska Airlines, Inc., 847 F. Supp. 832 (W.D. Wash. 1993), in which flight attendants conduct random, intermittent walkouts on selected flights. Unlike a mass walkout, a CHAOS strike usually disrupts only discrete segments of an airline’s operations, not the entire system. CHAOS is a “surgical” tactic designed to put pressure on management, and force an agreement, but not destroy the debtor in the process. See AFA brief, available at [www.nysd.uscourts.gov](http://www.nysd.uscourts.gov).

<sup>165</sup> Id. at 349-50. The bankruptcy judge declared there was no doubt the public interest was at stake, since NWA serves approximately 130,000 passengers per day, has 1,200 departures per day, is the sole carrier for 23 American cities, and provides at least half the airline services to another 20 cities. Id. at 350.

<sup>166</sup> Id. at 344. In general, a district court reviews a bankruptcy court’s factual findings under a clearly erroneous standard, and the lower court’s legal conclusions de novo. See Carey, supra, 816 F.2d at 88. A decision to grant or deny preliminary injunctive relief is measured by an abuse of discretion standard. See McCrory Corp. v. State of Ohio, 212 B.R. 229, 231 (S.D.N.Y. 1997). An abuse of discretion occurs where the bankruptcy court has relied upon clearly erroneous findings of fact or upon an error of law. See Blaise v. Wolinsky (In re Blaise), 219 B.R. 946, 950 (2d Cir. B.A.P. 1998).

<sup>167</sup> Id. at 351.

<sup>168</sup> See Burlington N.R.R. Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 444 (1987) (“Burlington”).

<sup>169</sup> Id. at 351. See 45 U.S.C. § 181 (extending the RLA to the airlines); Summit Airlines, Inc. v. Teamsters Local Union No. 295, 628 F.2d 787, 788, n.1 (2d Cir. 1980).

<sup>170</sup> Sequentially, other statutory aims are to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; and to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. Id. at 351-52. See 45 U.S.C. § 151a.

<sup>171</sup> Id. at 352, quoting Burlington, supra, 481 U.S. at 451; See Detroit & Toledo Shore Line R.R. Co. v. Transp. Union, 396 U.S. 142, 148 (1969) (“Detroit & Toledo”) (“The Railway Labor Act was passed in

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1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.”); *id.* at 154 (describing “the prevention of strikes” as the RLA’s “primary objective”); Texas New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 565 (1930) (“[T]he major purpose of Congress in passing the Railway Labor Act was ‘to provide a machinery to prevent strikes.’”).

<sup>172</sup> *Id.* at 352. See 45 U.S.C. § 152.

<sup>173</sup> *Id.* at 352.

<sup>174</sup> *Id.* at 352, quoting Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969).

<sup>175</sup> *Id.* at 352. See Chicago v. North Western Ry. Co. v. United Transp. Union, 402 U.S. 570, 577-78, 582-83 (1971) (“Chicago”).

<sup>176</sup> *Id.* at 352. See Consolidated Rail Corp. v. Railway Labor Executives’ Association, 491 U.S. 299, 302-04 (1989) (“Con Rail”); Summit Airlines, *supra*, 628 F.2d at 790.

<sup>177</sup> *Id.* at 353. See notice, 45 U.S.C. §§ 152 (Seventh), 156; negotiation and bargaining, 45 U.S.C. § 152 (Second); mediation by the NMB for an indefinite period of time, 45 U.S.C. § 155 (First); voluntary binding arbitration or, in the absence of such arbitration, a 30-day “cooling off” period, 45 U.S.C. §§ 155, 157; and the possibility of convening a Presidential Emergency Board, upon recommendation of the NMB, during such cooling-off period to seek a resolution, followed by yet another 30-day cooling-off period after the Emergency Board makes recommendations, 45 U.S.C. § 160.

<sup>178</sup> *Id.* at 353-54. See Con Rail, *supra*, 491 U.S. at 302.

<sup>179</sup> *Id.* at 354 (citations omitted).

<sup>180</sup> *Id.* at 354.

<sup>181</sup> *Id.* at 354-55.

<sup>182</sup> The NLGA was enacted to take “federal courts out of the labor injunction business,” Burlington, *supra*, 481 U.S. at 441. The NLGA prohibits federal courts from issuing “any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any injunction be issued contrary to the public policy declared in this chapter.” 29 U.S.C. § 101. Among the acts which may not be enjoined are those involving “Ceasing or refusing to perform any work.” 29 U.S.C. § 104(a). Responding directly to a pattern of labor injunctions issued by “overactive courts,” Congress sought by the NLGA to prevent courts from interfering in labor-management disputes and undermining the ability of labor groups to effectively negotiate labor agreements. Burlington, *supra*, 481 U.S. at 439; Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 772 (1961); United Steelworkers v. United States, 361 U.S. 39 (1959). Thus, the “Norris-LaGuardia Act... expresses a basic policy against the injunction of activities of labor unions.” Burlington, *supra*, 481 U.S. at 437 (quoting Machinists v. Street, 367 U.S. at 772). As the legislative history reveals, Congress viewed labor injunctions as “tyrannical... [and] an insult to American and Anglo-Saxon principles of liberty and justice...” 75 Cong. Rec. 5499 (1932). To prevent unwarranted judicial intervention into labor disputes, Congress made the definition of “labor dispute” broad, including “any controversy concerning terms or conditions of employment,” 29 U.S.C. § 113(c). Similarly, Congress made clear that it deprived all federal courts, including bankruptcy courts, of jurisdiction to issue labor injunctions. See Elsinore Shore Assocs. V. Local 54, HERE, 820 F.2d 62, 66 (3d Cir. 1987). See AFA brief, available at [www.nysd.uscourts.gov](http://www.nysd.uscourts.gov).

<sup>183</sup> *Id.* at 355. See 29 U.S.C. § 101.

<sup>184</sup> *Id.* at 355. See Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30, 40 (1957) (“Chicago River”).

<sup>185</sup> *Id.* at 355 (citation omitted).

<sup>186</sup> The NLRA, enacted after the RLA, is concerned with promoting “industrial peace.” NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937). Among the statutory purposes of the NLRA is to avoid “industrial strife which interferes with the normal flow of commerce.” 29 U.S.C. § 141.

<sup>187</sup> *Id.* at 355-56. See 29 U.S.C. § 157.

<sup>188</sup> *Id.* at 356.

<sup>189</sup> *Id.* at 356, quoting Bildisco, *supra*, 465 U.S. at 528.

<sup>190</sup> See 11 U.S.C. § 1113.

<sup>191</sup> *Id.* at 356. See Carey, *supra*, 816 F.2d at 87 (discussing Section 1113 as Congress’ swift response to overturn Bildisco). Accord Wheeling-Pittsburgh, *supra*, 791 F.2d at 1081-83; Century Brass, *supra*, 795 F.2d at 266-67 and 271-73. Indeed, the outcry, particularly from organized labor for remediation of

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Bildisco's harsh result, permitted Section 1113 to serve as the catalyst for an event of even greater historical significance for the then-nascent bankruptcy court system. The Bankruptcy Amendments and Federal Judgeship Act of 1984, commonly known as BAFJA, see Pub. L. No. 98-353, § 101, 98 Stat. 333 (1984), was the legislative band-aid applied to address the constitutional crisis of the modern bankruptcy court system, which ensued after the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), declared the bulk of system constitutionally defective. BAFJA and its predecessors had languished for nearly two years in the legislative chambers. Only the importance of promulgating Section 1113, as viewed by the strenuous lobbying of organized labor and its allies, and luckily with it the entire court reform package, broke the logjam in Congress. In this fashion, Section 1113 played a crucial role in salvaging the bankruptcy courts from constitutional limbo, and restoring both that forum and the modern Code to the positions they hold today. See Sabino, PRACTICAL GUIDE TO BANKRUPTCY at ¶ 1.5 and ¶ 1.6 (1995). See also Sabino, "Jury Trials In The Bankruptcy Court: A Continuing Controversy," 90 Commercial Law Journal 342, 343-44 (1985) (analyzing Marathon and BAFJA).

<sup>192</sup> Id. at 356 n. 11.

<sup>193</sup> Id. at 356-57.

<sup>194</sup> Id. at 357. See 11 U.S.C. § 1113(c).

<sup>195</sup> Id. at 357. See also 11 U.S.C. § 1113(f).

<sup>196</sup> 11 U.S.C. § 1113(b)(1).

<sup>197</sup> 11 U.S.C. § 1113(b)(2).

<sup>198</sup> 11 U.S.C. § 1113(d)(1).

<sup>199</sup> 11 U.S.C. § 1113(c), cited by id. at 357. Parenthetically, there is a narrow window for emergency interim relief prior to formal rejection, but only if "essential to the continuation of the debtor's business" or to "avoid irreparable damage to the estate." 11 U.S.C. § 1113(e), cited by id. at 357 n. 12.

<sup>200</sup> Id. at 357.

<sup>201</sup> Id. at 357.

<sup>202</sup> Id. at 358.

<sup>203</sup> Id. at 358 (citations omitted).

<sup>204</sup> Id. at 358.

<sup>205</sup> Id. at 358 (citing and explaining cases).

<sup>206</sup> Id. at 358.

<sup>207</sup> Id. at 358.

<sup>208</sup> Id. at 358-59. See Burlington, supra, 481 U.S. at 445; Jacksonville Terminal, supra, 394 U.S. at 378-79; Con Rail, supra, 491 U.S. at 302-03.

<sup>209</sup> Id. at 359. See Con Rail, supra, 491 U.S. at 302-03.

<sup>210</sup> Id. at 359. See Detroit & Toledo, supra, 396 U.S. at 154. There, the Supreme Court had commented that a union could not be expected to sit idly by and not call a job action when the employer/railroad took advantage and resorted to self-help itself. Id., 396 U.S. at 155. This has been criticized as dicta, observed the NWA court. NWA, supra, 349 B.R. at 359 n. 13.

<sup>211</sup> Id. at 359. See Detroit & Toledo, supra, 396 U.S. at 147.

<sup>212</sup> Id. at 360. See Con Rail, supra, 491 U.S. at 302-03, 310.

<sup>213</sup> Id. at 350.

<sup>214</sup> Id. at 360.

<sup>215</sup> Id. at 360. Likewise, the NWA court distinguished United Air Lines, Inc. v. Airline Division, International Brotherhood of Teamsters, 874 F.2d 110 (2d Cir. 1985), where the lengthy bargaining procedures had not yet even begun with a newly certified union, and the dispute turned upon the distinct status governing union election and certification. Id. at 360 (citations omitted).

<sup>216</sup> Id. at 361. See Brotherhood of R.R. Trainman Enter. Lodge No. 27 v. Toledo Peoria & W. R.R., 321 U.S. 50, 66 (1944). See also 29 U.S.C. § 108.

<sup>217</sup> Id. at 361, citing Eastern Air Lines, Inc. v. Int'l Association of Machinists and Aerospace Workers, 121 B.R. 428, 436 (S.D.N.Y. 1991) ("Eastern"), affirmed per curiam, 923 F.2d 26 (2d Cir. 1991).

<sup>218</sup> Id. at 361 n. 15. See Eastern, supra, 121 B.R. at 430-31.

<sup>219</sup> Id. at 361 (citations omitted).

<sup>220</sup> Id. at 361. See Bildisco, supra, 465 U.S. at 533.

<sup>221</sup> Id. at 361-62.

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<sup>222</sup> Id. at 362. See In re Ionsphere Clubs, Inc., 922 F.2d 984, 990-91 (2d Cir. 1990), cert. denied, 502 U.S. 808 (1991).

<sup>223</sup> Id. at 362.

<sup>224</sup> Id. at 362.

<sup>225</sup> Id. at 363.

<sup>226</sup> Id. at 363.

<sup>227</sup> Id. at 363, citing 901 F.2d at 1260-61.

<sup>228</sup> Id., 901 F.2d at 1260 and 1265.

<sup>229</sup> See Eastern, supra, 121 B.R. at 436, cited by NWA, supra, 349 B.R. at 363.

<sup>230</sup> NWA, supra, 349 B.R. at 363.

<sup>231</sup> Id. at 364.

<sup>232</sup> Id. at 364. The NWA court also gave some attention to the role of the NMB in proceedings such as these, as a further way to illustrate the flaws in the AFA’s arguments. Id. at 364-66. The RLA’s bargaining procedures are a three-way process, in which the mediation board plays the crucial role of the neutral. The NMB sets up negotiation sessions, monitors them, progresses to the next stage, and controls the duration of each interval. If one were to follow the union’s argument here, said Judge Marrero, the NMB would be effectively cut out of the picture. Condoning the union’s right to strike here, said the court, would prevent the Board from fulfilling its statutory function “and thus vitiate [ ] a crucial part of the RLA’s structure, process and remedies.” Id. at 366.

<sup>233</sup> Id. at 366-67.

<sup>234</sup> Id. at 367.

<sup>235</sup> Id. at 367 n. 18.

<sup>236</sup> Id. at 367.

<sup>237</sup> Id. at 367. See Bildisco, supra, 465 U.S. at 532. See also Aircraft Mechanics Fraternal Association v. Atlantic Coast Airlines, 125 F.3d 41, 44 (2d Cir. 1997) (“Atlantic Coast II”).

<sup>238</sup> Id. at 367. Moreover, the carrier’s actions were not in bad faith, arbitrary, unilateral or unlawful, and thus no one could claim the RLA was violated. Id. at 368.

<sup>239</sup> Id. at 368. See also Bildisco, supra, 465 U.S. at 528.

<sup>240</sup> Id. at 368.

<sup>241</sup> Id. at 368.

<sup>242</sup> Id. at 368-69. The NWA court also highlighted the fact that life at an insolvent carrier is anything but “business as usual.” Subject to judicial oversight, intervention by interested parties, and most of all, a fiduciary duty to maximize the debtor’s estate for the benefit of creditors, id. at 369 (citations omitted), “an RLA employer that is in a Chapter 11... does not have... the tools of self-help ordinarily available to solvent companies.” Id. at 370 (footnote omitted).

<sup>243</sup> Id. at 370.

<sup>244</sup> Id. at 370. And as Judge Marrero so succinctly put it, the heavy irony is that it was the very threat of labor discord that prompted the debtor to seek Section 1113 relief in the first place. Id. at 370.

<sup>245</sup> Id. at 370.

<sup>246</sup> Id. at 370.

<sup>247</sup> Id. at 370.

<sup>248</sup> Id. at 370. See Trans World Airlines, Inc. v. Independent Fed’n of Flight Attendants, 489 U.S. 426, 439 (1989) (quoting Jacksonville Terminal, supra, 394 U.S. at 383; see also Air Lines Pilots Ass’n, Int’l v. O’Neill, 499 U.S. 65, 80 (1991) (“National Labor Relations Act cases are not necessarily controlling in situations, such as this one, which are governed by the Railway Labor Act.”); Chicago & North Western, supra, 402 U.S. at 579 n. 11 (“[P]arallels between the [NLRA’s] duty to bargain in good faith and the [RLA’s] duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes.”) (emphasis supplied).

<sup>249</sup> Id. at 371. See Chicago River, supra, 353 U.S. at 31 n 2.

<sup>250</sup> Id. at 371. See 49 Stat. 499 (1935), codified as amended at 29 U.S.C. §§ 151 et seq.

<sup>251</sup> Id. at 371. See 29 U.S.C. § 152(2), (3).

<sup>252</sup> Id. at 371.

<sup>253</sup> Id. at 371.

<sup>254</sup> Id. at 371. See 29 U.S.C. § 157.

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<sup>255</sup> Id. at 371.

<sup>256</sup> Id. at 371, quoting Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO, 428 U.S. 397, 409 (1976) (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 225 (1962) (dissent)).

<sup>257</sup> Id. at 372. See Burlington, *supra*, 481 U.S. at 451 (“primary goal” of the RLA is “to settle strikes and avoid interruption to commerce”); Detroit & Toledo, *supra*, 396 U.S. at 149 (RLA passed “to prevent, if possible, wasteful strikes and interruptions of interstate commerce”); and 154 (RLA’s “primary objective” is “prevention of strikes”).

<sup>258</sup> Id. at 372 (citations omitted).

<sup>259</sup> Id. at 372. See Summit Airlines, *supra*, 628 F.2d at 794-95 (“Unlike the National Labor Relations Act, the Railway Labor Act is specifically designed and intended ‘(t)o avoid any interruption to commerce or to the operation of any carrier engaged therein .’)” (quoting 45 U.S.C. § 151a)).

<sup>260</sup> Id. at 372.

<sup>261</sup> Id. at 372.

<sup>262</sup> Id. at 373.

<sup>263</sup> Id. at 373, quoting Chicago & North Western, *supra*, 402 U.S. at 582.

<sup>264</sup> Id. at 373-74. “When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” F.C.C. v. NextWave Personal Communications Inc., 537 U.S. 293, 304 (2003). Where two statutes conflict, a court must “give effect to both statutes to the extent that they are not mutually repugnant. Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164, 169 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975). “In determining the meaning of a statute, courts must look not only to the particular statutory language, but also to the design of the statute as a whole and to its object and policy.” Johnson v. United States, 123 F.3d 700, 702-03 (2d Cir. 1997).

<sup>265</sup> Id. at 373. See Chicago & North Western, *supra*, 402 U.S. at 581.

<sup>266</sup> Id. at 374.

<sup>267</sup> Id. at 374.

<sup>268</sup> Id. at 375.

<sup>269</sup> Id. at 375 n. 23.

<sup>270</sup> Id. at 376. See also Chicago & North Western, *supra*, 402 U.S. at 582 n. 18.

<sup>271</sup> Id. at 377.

<sup>272</sup> Id. at 377.

<sup>273</sup> Id. at 377.

<sup>274</sup> Id. at 377-78.

<sup>275</sup> Id. at 378.

<sup>276</sup> Id. at 378.

<sup>277</sup> Id. at 378.

<sup>278</sup> Id. at 378.

<sup>279</sup> Id. at 378-79.

<sup>280</sup> Id. at 379.

<sup>281</sup> Id. at 379.

<sup>282</sup> Id. at 379 (citations omitted).

<sup>283</sup> Id. at 380.

<sup>284</sup> Id. at 380.

<sup>285</sup> Id. at 380. See In re Chateaugay Corp., 94 F.3d 772, 775 (2d Cir. 1996) (noting “important public policy favoring orderly reorganization and settlement of debtor estates”). See also Bildisco, *supra*, 465 U.S. at 528 (“The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”).

<sup>286</sup> Id. at 381.

<sup>287</sup> Id. at 381. See Bildisco, *supra*, 465 U.S. at 533.

<sup>288</sup> Id. at 381.

<sup>289</sup> Id. at 381.

<sup>290</sup> Id. at 381.

<sup>291</sup> Id. at 381. See also Bildisco, *supra*, 465 U.S. at 532.

<sup>292</sup> Id. at 381.

<sup>293</sup> Id. at 382.

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<sup>294</sup> Id. at 382.

<sup>295</sup> Id. at 382.

<sup>296</sup> Id. at 382.

<sup>297</sup> Id. at 382.

<sup>298</sup> Id. at 382.

<sup>299</sup> Id. at 383 (citations omitted).

<sup>300</sup> Id. at 383.

<sup>301</sup> Id. at 383.

<sup>302</sup> Id. at 383.

<sup>303</sup> Id. at 383.

<sup>304</sup> Id. at 383.

<sup>305</sup> Id. at 383-84. The epilogue speaks for itself. NWA held on long enough to propose a plan of reorganization (now pending), see NWA Disclosure Statement (February 15, 2007), available at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov), with its workers working and its aircraft flying. The parade of horrors of potential liquidation, disruption to the nation's airline industry, and so on was avoided. If nothing else, the practical results now so close to being finally obtained seem to justify the legal correctness, to say nothing of the equitableness, of the NWA decision. To be sure, the AFA did file an appeal with the Second Circuit Court of Appeals, and oral arguments were heard on November 28, 2006. See NWA Disclosure Statement, id. No decision has been issued to date. However, given the aforementioned prospect of a successful reorganization, this author believes the appeal shall either be settled or dismissed as moot. Yet the internecine warfare between the airline and the union goes on, as most recently the AFA moved in the bankruptcy court for recognition and payment of a claim of over \$1.1 billion to recover wages lost to pay cuts and the like. "Northwest Flight Crews' Ruling Delayed," USA Today (Thursday, March 22, 2007) at p. 1B, cl. 1.

<sup>306</sup> Mesaba Aviation, Inc. v. Aircraft Mechanics Fraternal Association (In re Mesaba Aviation, Inc.), 350 B.R. 112 (Bankr. D. Minn. 2006).

<sup>307</sup> Id. at 139-40.

<sup>308</sup> Id. at 121.

<sup>309</sup> Id. at 121.

<sup>310</sup> Id. at 119-20.

<sup>311</sup> Id. at 121-25.

<sup>312</sup> Id. at 125.

<sup>313</sup> Id. at 126.

<sup>314</sup> Id. at 126.

<sup>315</sup> Id. at 126-134.

<sup>316</sup> Id. at 126 n. 10.

<sup>317</sup> Id. at 134-138.

<sup>318</sup> Id. at 138-40.